

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE,

PETITIONER,

vs.

MOSE DUBERSTEIN, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Original Print

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A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 43646

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN, Husband and
Wife (Petitioners), APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE.

Appendix to Petitioners' Brief—Filed July 31, 1958

(File endorsement omitted)

Docket No. 59877

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN, Husband and
Wife, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Docket Entries

1955

- Oct. 17—Petition received and filed. Taxpayer notified. Fee paid.
Oct. 18—Copy of petition served on General Counsel.
Nov. 18—Answer filed by respondent.
Nov. 18—Request for hearing in Cincinnati filed by respondent.
Nov. 22—Notice issued placing proceeding on Cincinnati calendar. Service of answer and request made.

1956

- June 21—Hearing set Sept. 17, 1956, Cincinnati.
Sept. 17 & 26—Hearing had before Judge Tietjens on Petitioners' motion for continuance. Motion granted. Filed at hearing: Petitioners' motion for continuance (served); copy of letter of Petitioners' counsel, S. G. Kusworm, 9/13/56.

1957

- Mar. 7—Hearing set April 29, 1957, Cincinnati.
May 3—Trial had before Judge LeMire on merits. Petitioners' brief filed at hearing, served. Petitioners' brief due 6/18/57. Respondent's brief due 7/18/57. Petitioners' reply due 8/7/57.
2 May 21—Transcript of hearing 5/3/57 filed.
July 18—Respondent's brief in answer filed. Served 7/19/57.
July 29—Motion for extension of time to Sept. 18, 1957, to file reply brief, filed by Petitioner. 7/29/57 granted.
July 30—Motion of July 29 served.
Sept. 17—Reply brief for Petitioners filed. Served 9/18/57.

1958

- Jan. 17—Memorandum findings of fact and opinion filed, LeMire, J. Decision will be entered for Respondent. Served 1/17/58.
- Jan. 20—Decision entered; Judge C. P. LeMire. Served 1/21/58.
- April 15—Bond in the amount of \$5,140.96 approved and filed.
- April 15—Petition for review by U. S. Court of Appeals, 6th District, filed by Petitioners.
- April 15—Proof of service filed.
- May 6—Order extending time for filing the record on review and docketing the petition for review to July 14, 1958, entered.

IN THE TAX COURT OF THE UNITED STATES

Petition—Filed October 17, 1955

The above-named Petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols RC:CIN:AP:Cin:EJM) dated August 26, 1955, and as a basis of their proceeding allege as follows:

1. The Petitioners are individuals, and husband and wife, with their present address at 1429 Bryn Mawr Drive, Dayton, Ohio. The return for the period here involved was filed with the Director for the Cincinnati, Ohio district.
2. The notice of deficiency and statement (a copy of which is attached and marked Exhibit A) was mailed to the Petitioners on August 26, 1955.
3. The taxes in controversy are income taxes for the calendar year ended December 31, 1951, and is in the amount of \$2,570.48, representing the deficiency as set forth in Exhibit A.
4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:
 - (a) The determination of the Commissioner that the Cadillac automobile received by Mose Duberstein from Mohawk Metal Corporation in 1951 constitutes taxable compensation for personal services in the amount of \$4,250.00 is erroneous.

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(b) The Commissioner's disallowance of medical expenses in the amount of \$212.50 is erroneous.

5. The facts upon which the Petitioners rely as the basis for this proceeding are as follows:

(a) Mr. Mose Duberstein received said Cadillac purely and solely as a gift; there were never any business transactions between Mr. Duberstein and Mohawk Metal Corporation; there was never any obligation of any kind on the part of Mohawk Metal Corporation to pay Mr. Duberstein anything; he was told at the time he received the Cadillac that said Cadillac was being delivered as a gift; and any information given by Mose Duberstein to Mr. Morris Berman, President of Mohawk Metal Corporation was given purely as a personal favor without any hope or expectation of profit or gain.

(b) The determination of the Commissioner, disallowing medical expenses in the amount of \$212.50 is erroneous, because said disallowance is a result of the increased income erroneously added to petitioners' income by the Commissioner for the year 1951.

WHEREFORE, the Petitioners pray that this court may hear this proceeding, and determine that there is no deficiency due from Petitioners as set forth in the afore-

4. said notice of deficiency dated August 26, 1955.

/s/ Sidney G. Kusworm, Sr.,
SIDNEY G. KUSWORM, SR.,
Attorney for Petitioners,
Mose Duberstein and
Sylvia Duberstein,
403 Keith Building,
Dayton 2, Ohio.

*Duly sworn to by Mose Duberstein and Sylvia Duberstein
jurats omitted in printing.*

Exhibit "A" to Petition

**U. S. TREASURY DEPARTMENT
OFFICE OF THE REGIONAL COMMISSIONER
INTERNAL REVENUE SERVICE**

**Appellate Division
5th Floor, Faller Building,
106 E. Eighth Street
Cincinnati, Ohio**

**RC:CIN:AP
Cin:EJM**

August 26, 1955

**Mr. Mose Duberstein and Mrs. Sylvia Duberstein
Husband and Wife
953 Washington Street
Dayton 7, Ohio**

Dear Mr. and Mrs. Duberstein:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1951, discloses a deficiency in tax of \$2,570.48, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

6 Should you not desire to file a petition you are requested to execute the enclosed form and forward it to the Regional Commissioner of Internal Revenue, Appellate Division, Fifth Floor, Faller Building, 106 East Eighth Street, Cincinnati 2, Ohio. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after

receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner,

By (signed) ROBERT S. DECHANT,
Robert S. Dechant,
Associate Chief, Appellate
Cincinnati Region.

Enclosures:

Statement
IRS Publication No. 160
Agreement Form

NOTE: The execution and filing of this form at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, and does not, therefore, preclude the assertion of a deficiency or a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this form must be signed by both spouse, acting under a power of attorney, signs as agent for the other.

Where the taxpayer is a corporation, the form shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

7 Form 870 (1953)
U. S. Treasury Dept.
Internal Revenue Service

In re: Mose Duberstein and Sylvia Duberstein
953 Washington
Dayton, Ohio

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**WAIVER OF RESTRICTIONS ON ASSESSMENT AND
COLLECTION OF DEFICIENCY OF TAX
AND
ACCEPTANCE OF OVERASSESSMENT**

RC:CIN:AP
Cin:EJM

Pursuant to Section 272 (d) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws, the restrictions provided in section 272 (a) of the Internal Revenue Code or corresponding provisions of prior internal revenue laws are hereby waived and consent is given to the assessment and collection of the following deficiencies, together with interest on the tax as provided by law; and the following overassessments are accepted as correct:

DEFICIENCIES

TYPE OF TAX	YEAR ENDED	TAX	PENALTY	TOTAL
Income	Dec. 31, 1951	\$2,570.48		\$2,570.48

OVERASSESSMENTS

MOSE DUBERSTEIN (Taxpayer)

SYLVIA DUBERSTEIN (Taxpayer)

(Address)

By _____

Date

SEAL

STATEMENT

Mr. Mose Duberstein and Mrs. Sylvia Duberstein
Husband and Wife
953 Washington Street
Dayton, Ohio

Income Tax Liability for the Taxable Year
Ended December 31, 1951

YEAR
1951

DEFICIENCY
\$2,570.48

A copy of this letter and statement has been mailed to your representative, Mr. David E. Flagel, 328 Third National Building, Dayton 2, Ohio, in accordance with the authority contained in the power of attorney executed by you.

Net income disclosed by return	\$42,832.50
Unallowable deductions and additional income:	
(a) Other income	4,250.00
(b) Medical expenses	212.50
	<hr/>
Net income adjusted	\$47,295.00

Explanation of Adjustments to Net Income

(a) It is held that the cadillac automobile, valued at \$4,250.00, received by you during the year 1951, from the Mohawk Metal Corporation constitutes taxable income as compensation for personal services, within the purview of section 22(a) of the Internal Revenue Code of 1939.

(b) Your claimed medical expenses have been disallowed in the amount of \$212.50 in accordance with the provisions of section 23(x) of the Internal Revenue Code of 1939.

**Computation of Income Tax
Year Ended December 31, 1951**

Net income adjusted	\$47,295.00
Less: Exemptions	2,400.00
<hr/>	
Taxable net income	\$44,895.00
One-half of taxable net income	\$22,447.50
Normal tax, 3% of \$22,447.50	673.42
Surtax on \$22,447.50	8,131.08
<hr/>	
Combined normal tax and surtax	\$ 8,804.50
Income tax liability (2 × \$8,804.50) ...	\$17,609.00
Income tax liability disclosed by original return, account no. BF 6820	\$15,038.52
<hr/>	
Deficiency	\$ 2,570.48

10 IN THE TAX COURT OF THE UNITED STATES

Answer—Filed November 18, 1955

COMES NOW the Commissioner of Internal Revenue by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits, denies and alleges as follows:

1 to 3, inclusive. Admits the allegations of paragraphs 1 to 3, inclusive, of the petition.

4, (a) and (b). Denies the allegations of paragraph 4, (a) and (b) of the petition.

5, (a) and (b). Denies the allegations of paragraph 5, (a) and (b) of the petition.

6. Denies generally each and every allegation of the petition not hereinbefore specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the petition be denied and that respondent's determination be in all respects approved.

(Signed) JOHN POTTS BARNES,
Chief Counsel
Internal Revenue Service.

Of Counsel:

CLARENCE E. PRICE,
Regional Counsel,

GENE W. REARDON,
Assistant Regional Counsel,

JOHN J. LARKIN,
Attorney, Internal Revenue Service.

11 IN THE TAX COURT OF THE UNITED STATES

TRANSCRIPT OF PROCEEDINGS

Colloquy Between Court and Counsel

The Clerk: At this time we will call Docket No. 59877, Mose Duberstein and Sylvia Duberstein.

Will you state your appearances for the record, please?

Mr. Blitz: James D. Blitz for the Respondent.

The Clerk: For the Petitioner.

Mr. Kusworm: Sidney G. Kusworm, Sr., for the Petitioner.

The Clerk: Address?

Mr. Kusworm: 403 Keith Building, Dayton, Ohio. And we are ready for trial.

The Court: Very well, gentlemen. You may give a brief statement.

Mr. Kusworm: I beg your pardon?

The Court: I would like to have a brief statement of facts and issues in this case from each of the parties. You may proceed.

Mr. Kusworm: If Your Honor pleases, this case comes before the Court on a petition of the Petitioners for a redetermination of the deficiency set forth by the Commissioner in his Notice of Deficiency, dated August 26, 1955.

As a basis of their proceeding, the Petitioners allege that they are husband and wife. The amount of taxes involved

is \$2,570.48. And that the errors of the Commissioner were as follows:

The determination of the Commissioner that the Cadillac automobile received by Mose Duberstein from Mohawk Metal Corporation in 1951 constitutes taxable compensation for personal services in the amount of \$4,250.00. And then there's an item of medical expenses, which we are not questioning. The Commissioner has stated that to be in the amount of \$212.50.

The Court: You are now conceding that is erroneous?

Mr. Kusworm: We are willing to concede that.

The Court: Very well.

Mr. Kusworm: Mose Duberstein received a Cadillac purely and solely as a gift. There was never any business transaction between him and Mohawk. There were never any obligations of any kind on the part of Mohawk to pay him anything. He was told at the time he received the Cadillac that it was being delivered as a gift, and any information given by Duberstein to Mr. Morris Berman, who is the president of Mohawk, was given purely as a personal favor without any hope or expectation of profit or gain.

Now, if Your Honor pleases, we submit to the Court that no form No. 1099 was ever sent to Duberstein in February of 1952 showing the value of the Cadillac as compensation to him. The evidence will show that if he had received it, he would have turned it over to his accountant, David E. Flagel, a C.P.A., who will testify in this case. He would have turned it over to him immediately, which is his usual custom whenever such a notice is delivered to him. If he had known, and had been aware at the time the automobile was considered as compensation, he would have immediately gotten in touch with Berman and straightened the matter out, since Duberstein at no time considered this as compensation.

As a matter of fact, Your Honor, all that happened was this: The Duberstein Iron & Metal Company and the Mohawk Metal Company did business together for four years, most of it over the telephone, as is the custom of the trade. And one day Berman in his conversation with Duberstein on some matters referring to the Duberstein Iron & Metal

Company asked him if he knew of anybody that would be in the market to buy some certain kinds of materials that Duberstein didn't handle, and Duberstein said he didn't know but he might contact the people whose names he mentioned. That's all there was to it.

And the first information that Duberstein had about the matter being taxable was in 1954, when a representative of the Internal Revenue at Dayton requested to see him, and inquired of him about the automobile, and stated that in the opinion of the Government it was taxable.

At that time Duberstein told the agent of the transaction. I am not going to argue the law which is set forth in the brief, because I don't think this is the place for it. But I'd like to say this to Your Honor—When in 1955 out of a clear sky Duberstein, as an individual, and all the business transactions were with the company, if this was a gift it should have been a gift to the company. It wasn't a gift to anybody. Flagel contacted Gorin who was the agent for Mohawk in that he was their C.P.A. Gorin said that as far as he was concerned he didn't know how to handle the matter, Berman was in Europe. Gorin called him and told Berman that he didn't know how to put it on the books, and Berman said, "Well, what do you think about it?" He said, "Well, if it's a gift," he said, "It isn't taxable if it isn't a gift; it's taxable to Duberstein if it's a gift. How will I put it on the books?" He said, "Put it on the books as a finder's fee." And that's the way it got on the books. And that's how this case came up in 1954.

Numerous letters were written by registered mail to Berman, to Gorin, copies of which will be presented to the Court at the proper time, none of which were answered.

We claim, if Your Honor pleases, that this is a case in which Duberstein Iron & Metal Company, no Duberstein, either owes \$2,540.00 or they don't owe anything, and that's the reason the case hasn't been settled. I was practicing in this Tax Court for many many years, and it is the first case I've ever tried because I always believe in settling cases. But this kind of case cannot be settled. It's either the whole hog or none.

That's our case.

The Court: Very well.

Mr. Biltz: It is the Respondent's contention that infor-

mation was furnished to Mohawk Metal by Mr. Duberstein, and that this information proved to be very valuable to the Mohawk corporation, and that for this reason they compensated Mr. Duberstein with this Cadillac, and that the Government, the Respondent has treated this as taxable income, as compensation for services, and the basis of this was because there was complete lack of intent of the donor in this case to make a gift.

The Court: Very well. You may call your first witness.
Mr. Kusworm: I call Mose Duberstein.

Mose Duberstein.

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name and address, please, sir?

The Witness: Mose Duberstein; 951 Washington Street, Dayton, Ohio.

The Court: Mr. Duberstein, it is hard to hear in here. The acoustics are a little bad. If you will, speak up as loud as you can so the Court can hear you.

The Witness: I will try to.

By Mr. Kusworm:

15 Q. Mr. Duberstein, state whether or not you are the president of the Duberstein Iron & Metal Company, an Ohio corporation located at Dayton, Ohio? And talk loud so that His Honor can hear you. A. I am.

Q. That isn't very loud. How long have you been the president? A. For 25 years.

Q. Mr. Duberstein, state whether or not your company had during the years 1950 and '51, and prior thereto, business dealings with the Mohawk Metal Corporation? A. Yes, we did.

Q. And what were those business transactions? A. The business transactions with the Mohawk Metal Company were strictly on the basis—

Q. Well, buying and selling what? A. Buying and selling copper, or various other metals.

Q. Now, state whether or not most of these transactions were done by phone? A. All of them, practically.

Q. Did you know Mr. Berman personally? A. Yes, I did.

Q. And how long did you know him, or have you known him? A. I'd say about 7 years.

Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.

What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexiglas, and another was polyethylene, nickel salts.

Q. Now, state whether or not this information was given to him gratuitously and without any hope of monetary reward or gift of any kind? A. I expected nothing in return.

16 Q. Talk up. A. I expected nothing in return for—

Q. Now, back in 1951 state whether or not Berman called you with reference to a Cadillac automobile? A. He did and I told him at the time that—

Mr. Biltz: Objection, Your Honor. That is hearsay conversation with Mr. Berman.

By Mr. Kusworm:

Q. State what you said to Mr. Berman, and what Berman said to you.

Mr. Biltz: Objection.

Mr. Kusworm: We think this is very competent.

The Court: The objection is overruled at this time. If I find it is incompetent I can always ignore it.

A. He [Morris Berman] told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

By Mr. Kusworm:

Q. Now, at the time, did you need any automobile?
A. No; I had two cars.

Q. What kind? A. I had a Cadillac, and an Oldsmobile.

Q. State whether or not at any time you or any member of your company to your knowledge received from Mohawk or it's auditor or certified public accountant a form No. 1099? A. I never received it.

Q. Showing this transaction. A. Not at all.

Q. Now, what was your custom, and is your custom when any form 1099, or any other forms concerning
17 taxes are sent to your company, or to you by the Government? A. Well, they are immediately turned over, or mailed directly to the auditor, and he handles it from there on.

Q. Had you received form 1099 in 1952 state whether or not you would have contacted Berman immediately? A. Oh, I definitely would.

Q. Why? A. Because I didn't owe anything, any money. This car was strictly a gift, and I would have tried to straighten out the matter with him. Or if I had received that form 1099.

Mr. Kusworm: You may cross-examine.

Cross-Examination

By Mr. Biltz:

Q. Mr. Duberstein, this information, I believe you testified, proved valuable to Mohawk. Is that correct? That you furnished them in 1951? A. It was a matter of information. He asked me for information as to where he could dispose of that type of material.

Q. Had you not given him this information would you still have gotten this Cadillac car? A. Oh, I don't—

Q. You don't think so? A. I don't think so.

Q. No. I don't think so either. Do you know anything about how Mohawk treated this item on their income tax return, or— A. I have no knowledge of that.

Q. You have no knowledge of that. A. No.

Q. Do you have any knowledge of anything with reference to the corporate minutes of the Mohawk Metal Company? A. Not at all.

Q. You made no attempt even after the investigation to find out whether this was income or a gift; is that correct?

Mr. Kusworm: Object.

A. I didn't know that information until 1954.

By Mr. Biltz:

Q. 54? A. Until the Internal Revenue Department contacted me.

Q. What is a form 1099, do you know? A. I'm not too familiar with it.

Q. You are not familiar with it. A. No.

Mr. Biltz: That is all.

Redirect Examination

By Mr. Kusworm:

Q. State whether or not you ever got any form from anybody showing a tax indebtedness to the Government because of a gift? A. No, I never did.

Q. Now, state whether or not after you got this information you contacted Mr. Flagel, and whether or not to your knowledge he made an investigation as you have been interrogated about by the distinguished attorney for the Respondent? A. Well, after I was contacted by the Internal Revenue Department I contacted Mr. Flagel, and he handled the matter from there on in, and he contacted the auditor of the Mohawk Metal Company.

The Court: Who is Mr. Flagel?

The Witness: He's our auditor. He's my C.P.A.

The Court: He's your auditor.

The Witness: That is right.

The Court: Accountant.

The Witness: Our accountant, that's right.

The Court: Very well.

Mr. Kusworm: That's all, Mr. Duberstein.

(Witness excused.)

Mr. Kusworm: I call Mr. Flagel.

David E. Flagel.

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: May we have your name and address, please?

The Witness: David E. Flägel.

The Clerk: Your address?

The Witness: 327 First National Building, Dayton, Ohio.

Direct Examination

By Mr. Kusworm:

Q. Mr. Flägel, you are a Certified Public Accountant with offices in the First National Bank Building at Dayton, Ohio? A. Yes, sir.

Q. Now, you have to talk loud. The Judge has told you the acoustics here are bad. A. Yes, sir.

Mr. Kusworm: I happen to know that myself, Your Honor, from previous experience.

By Mr. Kusworm:

Q. How long have you been a Certified Public Accountant? A. Since 1936.

Q. State when Mose Duberstein of the Duberstein Iron & Metal Company first contacted you about the automobile in question? A. Sometime during 1954.

Q. State whether or not you were ever given by Mose Duberstein or the Duberstein Iron & Metal Company a form 1099? A. No.

Q. State what the custom is of Duberstein Iron & Metal Company and or Duberstein with reference to turning such notices over to you. A. He usually turns over to me all papers or matters pertaining to taxes so that I can take care of them from that point on.

20 Q. Now, in 19—

The Court: Just a minute. You take care of the tax accounts and returns of both the corporation and Mr. Duberstein individually?

The Witness: Yes, sir; for the corporation and for all of the personal returns.

The Court: Very well. Very well.

By Mr. Kusworm:

Q. Now, Mr. Flägel, when this matter was reported to you by Duberstein and or the Duberstein Iron & Metal Company, state what you did with reference to getting the story of the transaction from Mose Duberstein. A. Well, first—

Mr. Biltz: From Mose Duberstein?

Mr. Kusworm: Yes.

Mr. Biltz: I object, Your Honor. Those would be self-serving declarations.

Mr. Kusworm: I'm asking what he did.

The Court: I understand that; I understand he will go ahead and give me the whole picture. State what you did in regard to Mr. Duberstein.

A. (Continued) Well, I discussed the matter first with Mr. Duberstein to get the whole story from him before discussing it further with the agent, with the internal revenue agent.

By Mr. Kusworm:

Q. Now, what did Duberstein tell you? A. He explained that the automobile was unquestionably a gift, and one of the questions which I asked was whether he had ever received any information on form 1099 or any other information. Mr. Duberstein explained to me that he had talked to Mr. Berman many times during the interim between '51 and '54, and the question of compensation or taxability of the Cadillac had never arisen.

21 The Court: Now, then, after that did you contact Mr. Berman, or Mohawk in regard to it?

The Witness: Yes, sir.

Mr. Kusworm: I am coming to that.

A. (Continued) I wrote a letter to Mr. Berman—

By Mr. Kusworm:

Q. Now, in answer to His Honor's questions I want you to read a letter. State whether you sent it by registered mail to Mr. Berman, and exactly word for word let the record show what that letter contained. A. Well, first I'd like to mention—Well, all right.

I wrote a letter on May 4th, 1954, and sent it to Mr. Morris Berman, 30 West 90th Street, New York, and it was sent special—it was sent registered.

Q. Have you got the receipt? A. We have the receipt for it.

Q. Read it. A. "Dear Mr. Berman: Mr. Mose Duberstein, who has been my client for many years, suggested that I write to you in connection with the audit by the

Internal Revenue Department of his 1951 personal Federal income tax return.

"The agent making the examination has the information from the New York office to the effect that the Mohawk Metal Corporation paid Mose Duberstein \$4,250.00 during the year 1951 in the form of a Cadillac automobile, and deducted this item as an expense.

"In order to verify this, I corresponded directly with your accountant, Mr. Seymour Gorin, in Philadelphia. On May 1, 1954 he advised me that the Mohawk Metal Corporation did deduct this item as an expense on its Federal income tax return for that year. Also, that an information return on form 1099 was filed reporting this payment as income to Mose Duberstein. Mr. Gorin also gave me an excerpt of a letter which was given by Mohawk to the Internal Revenue Department in New York on September 9, 1953 stating that this payment was made to Mose Duberstein in the nature of a finder's fee.

"I have discussed this matter at great length with Mose Duberstein and he has assured me that it was his definite understanding and your understanding, also, that this car was given to him strictly as a gift. He at no time considered himself as employed by Mohawk, had no agreement for compensation, and there was never any legal liability to pay him. As a matter of fact, he would not have considered accepting the car under any circumstances other than as a gift. On the basis of compensation he would incur a very substantial tax liability. Mose Duberstein never considered that he as an individual was rendering any service to Mohawk. All business transactions in the past have always been between Mohawk Metal Corporation and Duberstein Iron & Metal Company. When Mose Duberstein was told of the Cadillac purchased for him, he naturally assumed it was a gift and accepted it as such.

"I would appreciate hearing from you regarding this matter at your earliest convenience.

"Very truly yours."

Q. Was that letter ever answered? A. No, sir.

The Court: You've read the letter in full?

The Witness: Yes, sir.

The Court: Very well.

By Mr. Kusworm:

Q. Now, further carrying out the question of His Honor, did you follow through on this matter with Mr. Gorin, who was the accountant for Mohawk, and let's tell His Honor what you did about that. A. I, also, corresponded with Mr. Gorin. I wrote to Mr. Gorin several times. I finally received one answer.

23 The Court: Well, rather than read those into the record why don't you offer them, offer copies of the letters?

Mr. Kusworm: Very well, Your Honor.

The Court: Or offer the—

Mr. Kusworm: We will offer them.

The Court: The originals, I take it, are not in your hands.

♦ Mr. Kusworm: They are not. But we will offer in evidence, Your Honor, to show the actions of the Certified Public Accountant for the tax payer—

The Court: Do you have any objection?

Mr. Biltz: I would like to see that last letter he was going to read.

The Court: You have no objection if these copies—

Mr. Kusworm: I want to show the letter to the accountant first.

The Witness: Well, I wrote several letters to him, Mr. Kusworm. Which one—

Mr. Kusworm: Now, this—

The Witness: I wrote my last letter on August 26, I believe, of 1956.

Mr. Kusworm: Here's the letter that he just—

By Mr. Kusworm:

Q. There was one that you wrote July 2nd, 1955. Is that right? A. Yes, sir.

The Court: If you gentlemen can agree, that is, if you have no objection, it would be better to have the letter, itself, in the record, than reading it.

Mr. Biltz: Yes, it would. I would like to see that last letter.

Mr. Kusworm: Yes. We would like to offer in evidence, Your Honor, all of these letters.

The Court: And the reply.

Mr. Kusworm: And the reply. For the reason that—

24 By Mr. Kusworm:

Q. You, Mr. Flagel, had a talk with Mr. Gorin, didn't you? A. Several talks.

Q. Several talks with him. And what did Gorin say? A. Gorin said substantially—well, the last talk I had with him was on September 6 of 1956.

Q. What did he say about the reason why this was put on Mohawk's books? A. Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and—

Mr. Biltz: Objection, Your Honor. He's—

The Court: It will be sustained.

If Mr. Biltz doesn't object to those letters, I'll permit you to offer copies.

Mr. Biltz: I believe I'll object to the letters, too, Your Honor. They are self-serving declarations, they are hearsay, and they are trying to prove the donor's intent by statements of the donee, his accountant. They have neither the donor nor his accountant here.

The Court: Well, the only testimony—I am not going to permit you to state what—Who is this man with Mohawk?

Mr. Kusworm: Gorin.

The Court: What Gorin said to you, but if you have any letters there—

Mr. Kusworm: Yes, we have a letter.

The Court: Over his signature, I thought perhaps you could agree that they could be introduced into evidence.

Mr. Kusworm: We have letters that Flagel wrote Gorin in which Flagel corroborated what Gorin told him personally over the phone.

The Court: Have you looked at that letter?

25 Mr. Biltz: I've looked at that letter, that one letter of May 1st is all right. We have no objection to it.

Mr. Kusworm: No, you haven't any objection to it. Then, we want all the correspondence. I think the Court ought to have all the facts in this case.

The Court: Well, have you other letters there?

Mr. Kusworm: Yes, Your Honor.

The Court: Take a look at them, and see if you have

objection to the other letters. I mean Mr. Biltz, I don't care about this man. Mr. Biltz, look at those letters.

Mr. Kusworm: He can look at the whole file, Your Honor. We have nothing to hide in this case. I'm willing to introduce Flagel's file on this case. In other words, I think that this Tax Court ought to have all the facts.

The Court: Well, in order for me to get the facts I've got to have—these conversations you are going to outline to me, I don't know whether they would testify that those are facts or not.

Mr. Kusworm: They are all reflected in the letters, Your Honor.

The Court: Well, I want the letters.

Mr. Kusworm: We want to introduce the letters. We want to introduce the whole file.

The Court: Well, the Court is trying to find out whether or not counsel for the Respondent will object to those letters. If he don't why, we'll have them in evidence.

Mr. Biltz: We would like Counsel to take each letter and introduce each letter separately, letter by letter, so that we could determine at the time which letters we would like to have in evidence and which ones we have objection to.

The Court: Well, if you're going to object to any of those letters from Mr. Gorin—is that his name? I don't want you to object to one—

26 Mr. Biltz: I think we should object to all of them. They are hearsay.

Mr. Kusworm: Well, they are letters between the parties, or their representatives, Your Honor, and it seems to me that the Government would want Your Honor to know all the facts in this case.

The Court: I know, but that is not testimony. They don't have an opportunity to cross-examine the witnesses or anything of the kind. You know that those are not proper evidence, and unless they will waive their objection, they are not admissible. I can't admit them. They are not sworn to, and, then, the Respondent doesn't have any opportunity to cross-examine them, or get them to explain their statements or anything of the kind.

Now, if you expected to use them as witnesses you should have had them here.

Mr. Kusworm: Well, now, if Your Honor please, I would

like to explain something to you. To have Berman here would have been futile. Berman didn't even answer that. Now, I'm going to come to Gorin—I am coming to Gorin. We contacted Gorin on the basis of what he said to Flagel, and Gorin said he wouldn't come here.

The Court: Well, you could have subpoenaed him.

Mr. Kusworm: I know we could have subpoenaed him, but I know what he would have repudiated.

The Court: You could take his deposition.

Mr. Kusworm: That's right, but he would have repudiated it. And the bald statement of the record right now is that this was purely and simply a gift, and let the Government refute our testimony on that point if they are objecting to the letters.

I want to ask you a question.

27 The Court: I will permit Mr. Berman's testimony to stand, but I am not going to permit the introduction of those letters at this time.

Mr. Kusworm: I understand that, Your Honor.

The Court: I am not going to permit you to read them into the record either.

Mr. Kusworm: I understand that, Your Honor. But you will permit me to taken an exception.

The Court: Yes. I will note your exception.

Mr. Kusworm: Thank you.

By Mr. Kusworm:

Q. I want to ask you this final question: Had you gotten form 1099 what would you have done with respect to that matter? A. I would have—

Q. In 1952. A. I would have advised Mr. Duberstein that that item was income to him for the year '51 and included it as such in his 1951 return.

Mr. Kusworm: You may cross-examine.

Cross-Examination

By Mr. Biltz:

Q. If you would have later received the form 1099 would you have still—would you have filed an amended return?

A. How much later?

Q. A couple years, two years. A. I would have advised Mr. Duberstein about it, and if it was determined to be

income, to him for the year '51, an amended return would have been filed, yes.

Q. Did Mr. Berman advise you that he had sent that 1099 to Mr. Duberstein? A. I never talked with Mr. Berman, or I never received an answer to my registered letter.

28 Q. Do you know whether Mohawk sent a form 1099? A. I don't know.

Q. You have no knowledge of that. A. I do know this, but it has to be through my telephone conversation with Mr. Gorin. Now, he explained to me that he did send 1099s out and he sent them all by registered mail, and he couldn't find the receipt for this particular 1099 although he told me he had receipts for all the other 1099s that he sent out.

Mr. Biltz: That is all.

Mr. Kusworm: That is all.

(Witness excused.)

Colloquy Between Court and Counsel

Mr. Kusworm: We rest.

The Court: Before you rest I want to ask Mr. Duberstein, what did you do with this Cadillac, Mr. Duberstein, after you received it?

Mr. Duberstein: What did I do with it? I used it officially.

The Court: Well, you had a Cadillac, you had an Oldsmobile, so you kept all three of them.

Mr. Duberstein: Yeah, I kept all three of them.

The Court: Very well.

The Petitioner rests?

Mr. Kusworm: The Petitioner rests.

The Court: Very well.

Mr. Biltz: The Respondent had subpoenaed a witness but the witness, we didn't give him enough time to appear, and we don't believe he is necessary anyhow now, and the Respondent rests.

The Court: Very well, gentlemen. How much time do you desire for filing of briefs?

Mr. Kusworm: I'd like to have as much time as it takes for me to walk to the bench, Your Honor.

29 The Court: Well, I'm going to give you more time than that, unless you are a slow walker.

Mr. Kusworm: I don't need any more time.

The Court: The Petitioner will have 45 days in which to file his original brief. That will be what date? Give us a specific date.

Mr. Kusworm: We are filing it now, Your Honor. We don't need any time.

The Court: I will make the entry and you may file it any time you want.

Mr. Kusworm: That's all right. We'll leave it right with this Clerk.

The Court: That will be what date, Mr. Clerk?

The Clerk: June 18.

The Court: How's that—June 18?

The Clerk: Yes, sir.

The Court: And the Respondent will be given 30 days thereafter to file his answer brief.

The Clerk: That will be July 18.

The Court: July 18. And the Petitioner will have 20 days from that date to file a reply to the Respondent's brief. That will be—

The Clerk: That will be—

The Court: August—

The Clerk: August the 7th.

The Court: The reply brief can be filed on or before August 7th.

The Clerk: This is you brief?

Mr. Kusworm: Yes. How many copies do you want?

The Clerk: One more copy.

Mr. Kusworm: One more?

The Clerk: Yes.

Mr. Kusworm: Very well.

30 The Clerk: Let the record show I am given the Petitioner's brief.

Mr. Kusworm: They are all signed.

The Clerk: Very well.

The Court: Call the next case.

(Whereupon, at 10:45 o'clock, A.M., Friday, May 3, 1957, the hearing was closed.)

IN THE TAX COURT OF THE UNITED STATES
Memorandum Findings of Fact and Opinion

T. C. Memo. 1958-4
(Filed January 17, 1958)

SIDNEY G. KUSWORM, SR., Esq., for the petitioners.
JAMES D. BILTZ, Esq., for the respondent.

This proceeding involves a deficiency in income tax for the year 1951 in the amount of \$2,570.48.

The sole issue is whether a Cadillac automobile received by petitioner, Mose Duberstein, from the Mohawk Metal Corporation in 1951 was a gift or constitutes taxable income.

FINDINGS OF FACT

Petitioners are husband and wife, residing at 1429 Bryn Mawr Drive, Dayton, Ohio. Their return for 1951 was filed with the director of internal revenue for the district of Ohio at Cincinnati, Ohio.

Petitioner, Mose Duberstein, is the president of Duberstein Metal Company of Dayton, Ohio, which did business with the Mohawk Metal Corporation, hereinafter referred to either as Mohawk or the payor.

In the taxable year 1951, at the solicitation of Morris Berman, president of Mohawk, Duberstein furnished certain information which proved helpful to Mohawk in obtaining consumers for certain chemical products it handled. Subsequently thereto, in the year 1951, Duberstein received from Mohawk a Cadillac car of the fair market value of \$4,250.

Prior to the time Duberstein furnished the information to Mohawk he had not been employed with that corporation. Duberstein had no agreement or understanding that he would be paid for the information which he furnished to Mohawk.

Mohawk considered the payment of the Cadillac automobile as in the nature of a "finder's fee," and treated the payment as a business expense and took a deduction therefor for Federal income tax purposes. Mohawk filed form 1099 as required by section 147 of the Internal Revenue Code of 1939 showing the payment of the Cadillac automobile to Duberstein.

In determining the deficiency the respondent included the amount of \$4,250, representing the fair market value of the Cadillac automobile, in petitioners' gross income for 1951.

The amount of \$4,250, representing the fair market value of a Cadillac automobile received by petitioner, Mose Duberstein, in 1951, from Mohawk Metal Corporation was not a gift but was a payment made in consideration of services rendered to it by Duberstein.

OPINION

LEMIRE, Judge: The sole question presented is whether the fair market value of a Cadillac automobile which the Mohawk Metal Corporation delivered to Duberstein in the taxable year 1951 was a gift within the meaning of section 22(b)(3), or constituted compensation for services rendered within the purview of section 22(a) of the Internal Revenue Code of 1939. Petitioner does not contest that the fair market value of the automobile was \$4,250.

Whether the payment was a gift or taxable income depends upon the intention of the parties, and the intention is to be determined from a consideration of all the facts and surrounding circumstances. *Alice M. MacFarlane*, 19 T. C. 9; *Fisher v. Commissioner*, 59 F. (2d) 192; *L. Gordon Walker*, 25 T. C. 832; *Ruth Jackson*, 25 T. C. 1106.

The intention of the donor is of particular importance, although the recipient's understanding of the nature of the payment is relevant.

The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. On the contrary, the testimony of petitioners' accountant reveals facts and circumstances surrounding the payment justifying the reasonable inference that the payor never intended the payment as a gift.

Petitioners contend that the payment was made as the result of a close personal relationship that existed between Duberstein and Berman, the president of the payor. The latter, however, was not called as a witness.

Petitioners take the position that Duberstein was not an employe of the payor at any time; that at the request of Berman over the telephone he voluntarily and without ex-

pectation of a reward, furnished information as to possible consumers of certain products handled by the payor; that such information was given gratuitously, and that he accepted the automobile only because of Berman's insistence that he accept it as a gift.

That Duberstein was not an employee of the payor; that he gave the information voluntarily because of the close personal relationship existing between himself and

33 Berman and without expectation of remuneration bears on Duberstein's intent in accepting the automobile. It is not sufficient to establish the donative intent of the payor.

A payment may be compensation for services rendered although made voluntarily and without legal obligation on the part of the payor. *Leon D. Hubert, Jr.*, 30 T. C. 201; affd. 212 F. (2d) 516; *Poorman v. Commissioner*, 131 F. (2d) 946.

The payment was made by a corporation and it entered the payment on its books as a "finder's fee." The corporation not only claimed the amount as a business expense on its Federal income tax return, but filed an information return (form 1099) as required by section 147 of the Internal Revenue Code of 1939, disclosing the payment to Duberstein. Such facts tend to negate any donative intent of the payor.

Furthermore, this record is barren of any evidence that the directors or stockholders gave approval to a gift of corporate funds. The lack of such evidence creates an assumption that no gift was intended. Cf. *Alex Silverman*, 28 T. C. 1061.

The services of Duberstein were solicited by the metal corporation from which it presumably benefited so that the payment may be properly categorized as compensation for personal services.

Petitioners advance the argument that since the testimony of Duberstein was uncontradicted, and his credibility was not questioned, the presumption of the correctness of the respondent's determination is overcome and meets petitioners' burden of showing a gift. In the light of the testimony of petitioners' account revealing facts tending to negate any donative intent of the payor, the argument is not persuasive.

34 Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein. As such it constitutes taxable income in 1951 within the purview of section 22(a), I. R. C. of 1939.

Petitioners concede the correctness of the respondent's adjustment relative to the medical deduction claimed.

Decision will be entered for the respondent.

IN THE TAX COURT OF THE UNITED STATES

Decision—January 20, 1958

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed January 17, 1958, it is ORDERED AND DECIDED: That there is a deficiency in income tax for the year 1951 in the amount of \$2,570.48.

/s/ C. P. LEMIRE,
Judge.

35 **Minute Entry of Argument and Submission—
February 25, 1959**

(omitted in printing)

36 IN THE UNITED STATES COURT OF APPEALS

Judgment—April 8, 1959

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

(File endorsement omitted)

No. 13,646

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITMOSE DUBERSTEIN and SYLVIA DUBERSTEIN, husband and
wife, *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Petition for Review of Decision of the Tax Court

Before MARTIN, Chief Judge; MILLER, Circuit Judge;
and O'SULLIVAN, District Judge.**Opinion—Decided April 8, 1959**

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of \$4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Berman would ask questions about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman

or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Duberstein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk's accountant, prepared the 1951 tax return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

"Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

39

The Tax Court concluded as follows:

"Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

"He (Mr. Berman) told me that due to the fact that I—information that I had given him was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted this Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrangements were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee". If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for

Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

"He * * * explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 45 F. (2) 43 (45):

"We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford v. Commissioner of Internal Revenue*, 62 F. (2) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

"We have repeatedly held that the taxpayer has made out his case when he has put in proofs clearly and distinctly tending to show a determinating fact."

* * * The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis; and we have gone so far as to say that the taxpayer's affirmative evidence may itself con-

tain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lunsford v. Commissioner*, supra, Judge Simons characterized such attitude as follows:

"At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to support the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

42 Clerk's Certificate to foregoing transcript omitted in printing.

43

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1959

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN

**Order Extending Time to File Petition for Writ of Certiorari—
July 7, 1959**

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 5, 1959.

WILLIAM J. BRENNAN, JR.

*Associate Justice of the Supreme
Court of the United States*

Dated this 7th day of
July, 1959

44

SUPREME COURT OF THE UNITED STATES

No. 376

October Term, 1959

(Title omitted)

Order Allowing Certiorari—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 55.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

U.S. Supreme Court, U.S.

FILED

SEP 4 1959

JAMES R. BURNING, Clerk

No. **876**

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

J. LEE RANKIN,

Solicitor General,

CHARLES E. RICE,

Assistant Attorney General,

WAYNE G. BARNETT,

Assistant Attorney General,

GEORGE W. BRATTY,

Attorney,

Department of Justice, Washington 25, D.C.

LETTER FOR WRIT.

F

CERTIDRARI

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§ 22(a)	2
§ 22(b)(3)	2-3
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§ 101	14
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§ 170	14
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court (R. 30a-34a)¹ are not officially reported. The opinion of the court of appeals, (Appendix A, *infra*, pp. 21-26) is reported at 265 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (*infra*, p. 26). On July 7, 1959, by order of Mr. Justice Brennan, the time within which

¹“R.” refers to the appendix to the appellants’ brief in the court of appeals.

to file a petition for a writ of certiorari was extended to and including September 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer, upon request, gave to a business corporation the names of potential customers. The information proved valuable and the corporation reciprocated by giving the taxpayer a Cadillac, the cost of which it deducted as a business expense in the nature of a finder's fee. The question is whether the car was income to the taxpayer or a "gift" excludible under § 22(b)(3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross

income and shall be exempt from taxation under this chapter:

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

STATEMENT

Mose Duberstein, the taxpayer,² was the president of the Duberstein Iron & Metal Company of Dayton, Ohio. He was personally acquainted with Morris Berman, the president of the Mohawk Metal Corporation, the two companies having done business with each other over a period of years. On several occasions in 1951, Berman asked Duberstein if he knew of any concerns that used certain products sold by Mohawk, and Duberstein suggested various names. There was no understanding or agreement that Duberstein would be paid for the information (R. 15a). Later in 1951, Berman telephoned Duberstein; the substance of the conversation, as related by Duberstein, was as follows (R. 16a):

He told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect

² Sylvia Duberstein is a party only because she filed a joint return with her husband.

anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

Mohawk deducted the cost of the car as a business expense in the nature of a finder's fee. Duberstein treated the car as a gift and did not report it as income (R. 31a).

In deficiency proceedings, the Tax Court upheld the Commissioner's determination that the car was taxable income to Duberstein, finding no evidence that it was intended as a gift (R. 30a-34a). The court of appeals, with Chief Judge Martin dissenting, reversed, holding that Duberstein's account of the telephone conversation was "clear and distinct evidence of the donative intent of Berman" and required a finding of a gift excludible from income under § 22(b)(3) of the Internal Revenue Code of 1939 (*supra*, pp. 2-3).

REASONS FOR GRANTING THE WRIT

There is now pending before the Court, in *United States v. Kaiser*, No. 55, certiorari granted, 359 U.S. 1010, the question whether strike benefits paid by a union to striking employees are taxable to the recipients as income or are within the statutory exclusion for "gifts." The instant case is one of two cases involving related gift-income problems which the Government intends to urge the Court to hear and consider simultaneously with its consideration of the *Kaiser* case. The other, in which we are informed the taxpayer intends to file a petition for certiorari, is *Stanton v. United States*, decided July 6, 1959 (rehearing denied, July 30, 1959), in which the Court of

Appeals for the Second Circuit, by a divided court, reversed a district court decision that a \$20,000 "gratuity" paid by a corporation to its resigning president was exempt as a gift. (The opinion in the *Stanton* case is set forth as Appendix B, *infra*, pp. 27-36.)

In common with the *Kaiser* case, these cases pose the basic problem of the characterization as gift or income of payments made without legal obligation in a business context. In the *Kaiser* case, however, the underlying issue is complicated by a number of unique aspects of the strike-benefits problem: *e.g.*, the fraternal or mutual-benefit nature of a labor organization; the relation of the payments to need; and the express condition of the payments that the recipient be on strike. For that reason, we believe that the basic gift-income problem is not fully or adequately presented by the *Kaiser* case alone, and that the Court should also have before it the more fundamentally important aspects of the problem presented by this case and *Stanton*.

1. The problem presented by these cases is essentially the continually recurring one of reconciling the implications of *Bogardus v. Commissioner*, 362 U.S. 34, with those of *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730. It has been accepted doctrine at least since the *Old Colony* case that a payment may be compensation for services even though there is no obligation to make it. Yet *Bogardus* seems to hold that a payment is not necessarily income because "inspired by gratitude for the past faithful service of the recipient" (p. 44). If a payment may be income though gratuitously made and may be a gift though made in recognition of past services, there is necessarily great difficulty in dis-

linguishing between the one and the other. After twenty years of experience under *Bogardus*, the lower courts, we believe, have been unable to find a satisfactory answer, with the result that decisions have turned essentially upon *ad hoc* judgments of tax policy—sometimes characterized as conclusions of “fact”—or even upon the payor’s self-serving characterization of the payment.³

³Because the lower courts seldom refine the issues beyond the ultimate question whether the payment was “intended” as a gift or explain the rationale for their decisions, the nature of the uncertainties and inconsistencies cannot readily be summarized. Since the courts most frequently content themselves with listing the “evidence” supporting one conclusion or the other—which in itself, we suggest, reflects the lack of guiding principles—perhaps the best index of the underlying confusion is the extent of disagreement over the relevance of particular kinds of evidentiary facts. It has been held, for example, to be important by some courts but immaterial by others: that the payor deducted the payment (compare *Willkie v. Commissioner*, 127 F. 2d 953, 956 (C.A. 6), certiorari denied, 317 U.S. 659; *Bausch’s Estate v. Commissioner*, 186 F. 2d 313, 314 (C.A. 2); *Poorman v. Commissioner*, 131 F. 2d 946, 949 (C.A. 9); *Silverman v. Commissioner*, 28 T.C. 1061, 1066; with *Bounds v. United States*, 262 F. 2d 876, 882 (C.A. 4); *Hellstrom v. Commissioner*, 24 T.C. 916, 919); that the payments were not ratified by the stockholders (compare *Noel v. Parrott*, 15 F. 2d 669, 671 (C.A. 4), certiorari denied, 273 U.S. 754; *Botchford v. Commissioner*, 81 F. 2d 914, 916 (C.A. 9); *Fitch v. Helvering*, 70 F. 2d 583, 586 (C.A. 8); *Yuengling v. Commissioner*, 69 F. 2d 971, 972 (C.A. 3); *Walker v. Commissioner*, 25 T.C. 832, 837; with *Lunsford v. Commissioner*, 62 F. 2d 740, 742 (C.A. 6); *Macfarlane v. Commissioner*, 19 T.C. 9); that the widow of an employee had not herself performed services (compare *Bounds v. United States*, *supra*; *Lunsford v. Commissioner*, *supra*; *Luntz v. Commissioner*, 29 T.C. 647, 650; with *Simpson v. United States*, 261 F. 2d 497, 501 (C.A. 7), certiorari denied, 359 U.S. 944; *Farnedoe v. Allen*, 158 F. 2d 467, 468 (C.A. 5), certiorari denied, 330 U.S. 821; *Fisher v. United States*, 129 F. Supp. 759, 762 (D. Mass.); and that death bene-

This case and *Stanton*, we believe, provide an appropriate occasion for a further examination of the problem by this Court. Each is a prototype of a typical problem, and the basic conflict in their concepts of the nature of a gift for tax purposes discloses the causes and nature of the confusion in the lower courts.

(a) *The Duberstein Case*: In *Duberstein*, we may accept the description of the transaction given by Duberstein himself (R. 16a):

He [Berman] told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. * * * I told him he owed me

fits paid to a widow or the employee's estate were based on the amount of his salary (compare *Simpson v. United States*, *supra*; *Bausch's Estate v. Commissioner*, *supra*; *Willkie v. Commissioner*, *supra*; *Jackson v. Commissioner*, 25 T.C. 1106, 1111; with *Bounds v. United States*, *supra*; *Hellstrom v. Commissioner*, 24 T.C. 916, 919). Perhaps most unclear of all is the weight given to the payor's own characterization of the payment as a gift or as compensation, which may from time to time be controlling, significant, inconclusive, or immaterial. See, e.g., the present case; *Botchford v. Commissioner*, *supra*; *Bounds v. United States*, *supra*; *Wallace v. Commissioner*, 219 F. 2d 855, 858 (C.A. 5); *Lincoln Nat. Bk. v. Burnet*, 63 F. 2d 131, 133 (C.A. D.C.).

Nor is there even agreement over the nature of the ultimate question as one of "fact", subject to review only under the "clearly erroneous" standard or to be left to the jury, or as one of law or of mixed law and fact, on which the appellate courts may draw their own conclusions from the evidentiary facts. Compare *Peters v. Smith*, 221 F. 2d 721 (C.A. 3); *Neville v. Brokrick*, 235 F. 2d 263, 266 (C.A. 10); *United States v. Bankston*, 254 F. 2d 641, 642 (C.A. 6); *Stanton v. United States*, *supra* (dissenting opinion); with *Bogardus v. Commissioner*, *supra*; *Bounds v. United States*, *supra*; *Simpson v. United States*, *supra*; *Willkie v. Commissioner*, *supra*.

nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted that I accept this Cadillac car.

That testimony established the undisputed facts that Duberstein gave the information without expectation of payment, that the information proved valuable, and that the car was given in appreciation for the information. There was thus sharply posed the question whether a voluntary payment prompted by gratitude for business services was taxable. To the court below, however, that question turned on a further question of fact, *i.e.*, whether the payment was intended "as" a gift. The court then found controlling evidence of an intent to make a gift in the very testimony quoted above, corroborated, the court said, by an indication that Berman "was talking about this Cadillac as a gift" in later discussions with his accountant (*infra*, p. 24). All that either source added to the conceded fact that the payment was voluntary, however, was that Berman called it a "present" or a "gift". That, we submit, did not advance the critical inquiry. Since there was no obligation to make the payment, many laymen undoubtedly would call it a gift. If, on the other hand, Berman was thinking of the tax, rather than a lay, definition, his characterization was no more than his own legal conclusion, which is equally irrelevant. Thus, the decision below rests ultimately either on an unarticulated judgment that payments made freely and voluntarily should be treated as gifts for tax purposes even though motivated by gratitude for services, or

on the irrelevant fortuity that the payor called it a "present."

(b) *The Stanton Case*: In *Stanton*, the president of a real estate corporation resigned after ten years of service and was voted by the board of directors, "in appreciation of [his] services * * *, a gratuity" of \$20,000.* It was testified that the directors "liked" him "personally", thought that he "was entitled to that evidence of good will", and intended the payment as a "gift." The district court found that the payment was a "gift" and not taxable. The Court of Appeals for the Second Circuit, in an opinion by Judge Hand, after finding it "impossible to reconcile the decisions," held that the payment was income on the ground that there was "no evidence that personal affection did enter into the payment" or that the payment was anything "more than an expression of gratitude for exceptional services rendered" (*infra*, pp. 27-31).

(c) ~~The approach of the Second Circuit in *Stanton*~~ was fundamentally different from that of the Sixth Circuit below in *Duberstein*. Rather than asking what the payment was intended *to be*, the court in *Stanton* focused attention directly on the motives for the payment and made those determinative of the legal consequences. More importantly, it in effect defined gratitude for services as a motive which, if alone or dominant, gives rise to income. In its view, only if some in-

*The real estate corporation was wholly owned by the Trinity Church, of which Stanton was also comptroller, and the payment came in part from the church itself, but those facts have no significance here.

dependent motivation, such as personal friendship or affection, plays a major role in inducing the payment can the question of "gift" arise. Since in the *Dubenstein* case it was never claimed that personal affection, as distinct from business gratitude, entered into the payment, the underlying conflict between the two decisions seems to us apparent.⁵

2. While the problem presented by these cases has its counterpart in the context of payments between individuals, its primary importance lies in the tax treatment of payments made by business entities, and particularly, as here, by corporations. The peculiar significance of the problem in that context derives from the interrelation of the tax consequences of such a payment to the several potential taxpayers involved—the payee, the payor; and, in the case of a corporation, the payor's officers or stockholders.

⁵ Even more directly in conflict on its facts with the *Stanton* case is the decision of the Third Circuit in *Peters v. Smith*, 221 F. 2d 721, holding that the jury had properly found that a pension paid by a department store to an employee retired after 41 years of service because no longer able to perform his duties was a gift, notwithstanding the employer's established policy to provide such pensions to employees no longer able to work. As in *Dubenstein*, the court framed the issue as one of fact whether the payment was "intended" as compensation or a gift. Compare the earlier decision of that court in *Mutch v. Commissioner*, 209 F. 2d 390, reversing a Tax Court finding that a pension paid to a retiring minister out of church funds was compensation and not a gift. See also *Schall v. Commissioner*, 174 F. 2d 893 (C.A. 5); *Abernethy v. Commissioner*, 211 F. 2d 651 (C.A.D.C.); and *Hershman v. Kavanagh*, 120 F. Supp. 956 (E.D. Mich.), affirmed, 210 F. 2d 654 (C.A. 6), similarly holding pensions to ministers or rabbis to be gifts, in the first two reversing contrary decisions of the Tax Court.

Under the definition of gifts seemingly being applied by most of the lower courts, "gifts" and "business expenses" are not mutually-exclusive categories and a payment may be both a gift nontaxable to the recipient and a business expense deductible by the payor.⁶ The effect of such non-exclusive definitions of gifts and business expenses is that what is admittedly an income item to begin with—the earnings of the business used to make the payment—may escape taxation altogether. That is, a deductible payment, since it reduces the income otherwise taxable to the payor, in effect comes "out of" its business income. If, in turn, the payment is treated as a "gift" to the payee, the result is that the income is taxable neither to the payor nor to the payee. A further aspect of the

⁶ See, e.g., the explicit statement of the Third Circuit: "Of course, a gift may be a business expense and as such a legitimate deduction in the donor's income tax computation." *Peters v. Smith*, *supra*, 221 F. 2d at 725, n. 3.

The most frequent example of this result occurs in the "widow bonus" cases. Although it has been generally accepted that the continuation of a deceased employee's salary to his widow for a short period is a proper business expense, numerous cases hold with relative consistency that, in the absence of a contractual obligation (or possibly a moral obligation arising from an established practice on which the employee may have relied), such payments are nontaxable gifts to the widow. See *Bounds v. United States*, *supra*; *Reed v. United States* (W.D. Ky), decided January 16, 1959 (59-1 U.S.T.C., par. 9264), appeal pending (C.A. 6); and the 30-odd cases cited in Jennings, *Voluntary Payments to Widows of Employees*, 37 Taxes 531, 534, n. 8. Cf. *Simpson v. United States*, *supra*. Nor is that result due to inconsistent factual determinations. Rather, it is due to the fact that the definition of gifts being applied is itself broad enough to include some payments that are properly deductible.

problem, though less apparent, is that if the payor is a corporation its business income used to make the "gift" has not been fully taxed even if the corporation itself does not claim a deduction: although taxed at corporation rates, the income has passed out of the corporation into the hands of an individual who is presumably the object of the officers' or stockholders' bounty without having been taxed at individual surtax rates either to the officers or stockholders or to the recipient.

That aspect of the "business gift" problem—the interrelation of the tax consequences to the payee, the payor, and the payor's officers or stockholders—not only emphasizes the importance of the problem but also focuses attention on the basic question of statutory interpretation which we believe is posed by these cases, namely, whether and to what extent there should be attributed to Congress a purpose, by the gift exclusion, to permit ordinary business income to escape taxation. That is not a consequence of ordinary gifts of a personal non-business nature,⁷ and at the very least that result ought not to be accepted for business "gifts" without a more explicit consideration of the underlying purposes of the gift exclusion than has been forthcoming from the lower courts.

⁷ *I.e.*, the typical non-deductible payment by one individual to another. In such cases, the only question is whether the transaction of which the payment is a part is one itself giving rise to income (*e.g.*, performance of personal services by the payee). While that aspect of the problem is also present here, the more fundamental problem is whether what is already an income item should be allowed to escape taxation by virtue of the payment from one taxpayer to another.

3. Notwithstanding the apparent conflict of decisions and the importance of the question, it may be thought that the concept of "gift" is so incapable of precise definition as to admit of no better solution than the *ad hoc* approach of the lower courts, and hence that little could be accomplished by further review by this Court. It is our belief, however, that more meaningful standards for decision can be evolved, and, if the writ is granted in this and the *Stanton* case, we hope to be able to present to the Court a formulation of the problem that will offer some progress towards its solution.

In our view, a substantial step forward can be made, at the outset, by clarifying the elements of "intent" upon which characterization should turn. To the Sixth Circuit in the *Duberstein* case, as to many courts, the question was what the payment was intended *to be*—*i.e.*, whether it was intended "as" a gift or "as" compensation. To the Second Circuit in *Stanton*, on the other hand, the question was *why* the payment was made—*i.e.*, whether it was induced by gratitude for services or by love and affection. The latter approach seems to us the more meaningful one. Given the same motivation for the payment—*e.g.*, appropriate gratitude for valuable services—we question whether there is any distinction between a payment intended "as" compensation for the services and one intended "as" a gift in appreciation of the services. Having decided to make the payment, all the payor then "intends" is to make the payment, and if he thinks of it in his own mind as a "gift" or as "compensation" he can do so only by, wittingly or unwittingly, attributing to it his own legal classification.

All that can reasonably be asked of the trier of fact (or of the payor himself) is what induced the payment, and it is for the courts then to say whether these motives should lead to a characterization of the payment as a "gift".

The crucial problem remains, of course, of defining which motives should be treated as "gift motives," a problem which, because of the uncertainty in the meaning of "intent," seems to have received little direct attention. One tentative approach to that problem, subject to refinement and study of its full implications, is to define "gifts," at least for purposes of gifts by business entities to individuals, in terms mutually exclusive of "business expenses." It may be said that the essence of a gift is that it springs from purely *personal* motivations—love, sympathy, generosity—to which the existence of a business purpose or justification is antithetic. On that view, it would follow that, if a payment is sufficiently an "obligation" of the business to be deemed a just charge against its profits (giving full recognition to the present-day concepts of the responsibilities of a business toward its employees and other persons who contribute to its success), it does not bear the mark of that uniquely personal generosity that characterizes a gift.*

While an explicit recognition of the need to correlate the tax treatment of the payor and the payee

* We are concerned here only with gifts to private individuals which cannot qualify as public or charitable. Charitable contributions, made out of the now-recognized civic and social responsibilities of business, pose a different problem, and the tax consequences are governed by special provisions. See §§ 23(q) and 101 of the 1939 Code; §§ 170 and 501 of the 1954 Code.

would no doubt afford the major argument for adopting that approach, the gift definition itself need not depend upon a determination in each case whether the particular payment was or was not deductible by the payor. The definition of gifts would stand on its own feet, but, by excluding payments for which there is a business justification, would be sufficiently narrow automatically to exclude any payment that could properly be claimed as a deduction. That approach, while recognizing the relevance of the correlation problem to the formulation of a definition of gifts, would not in fact require the court to decide more than the precise issue before it—*i.e.*, whether the particular payment involved is a "gift."

In the case of a corporation, it may be noted, the foregoing approach could have implications going beyond the correlation of taxability to the payee and deductibility by the payor. By definition, a payment would be a gift only if there was no business justification for it and it was motivated solely by the *personal* affection or generosity of, say, the stockholders or the officers. The lack of business purpose for such a payment, however, might require that it be treated for federal tax purposes as having been made on behalf of the individual benefactors (the officers or stockholders, as the case may be), and, accordingly, be taxed as income (additional compensation or dividends) to them. The result could be that an alleged "gift" by a business corporation would be taxable either to the recipient (if made for a business purpose) or to the officers or stockholders whose desires

were gratified by the payment (if made for no business reason and hence a true gift).

As we have indicated, the foregoing is but a tentative analysis of one possible approach to the problem of "business gifts". That, or other possible approaches, can be fully developed upon a hearing on the merits. Our purpose here is only to demonstrate, as we think the above analysis does, that the present lack of guiding principles is not inherent in the problem and that a more precise formulation of the issues is certainly possible and is desirable.

4. The question presented here is peculiarly one that can be resolved only by this Court. As the majority and dissenting opinions in the *Stanton* case (*infra*, pp. 27-36) illustrate, it is this Court's decision in *Bogardus v. Commissioner*, 302 U.S. 34, that has been the major source of the difficulties the lower courts have encountered in dealing with the problem. While the scope given to *Bogardus* seems to us unwarranted, the deference paid by the lower courts in this instance to the implications of a Supreme Court decision is not unusual, and as a practical matter it is only this Court that can confine *Bogardus* to its proper place and open the way for a further clarifying development in this area.

The *Bogardus* case does not, we believe, pose a hazardous obstacle to a reconsideration or reformulation of the problem by the Court. In the first place, that decision was quite expressly limited to its own special facts, and on those facts there is much to be said for the holding. The stockholders of a highly successful

operating company (Universal) had caused the liquid assets of the company to be transferred to a newly-formed investment company (Unopco) and had then sold all of their stock in the operating company. They then, as stockholders of Unopco, voted to pay out of Unopco's assets (charged directly to surplus) a total of some \$600,000 for various present and former employees of Universal as an expression of their gratitude for the great success those employees' loyal services had brought them. Viewing Unopco as a separate entity having no connection whatever with the payees, as the Court emphasized it must be viewed, it was clear that there was no business or corporate justification for the payment and that it was motivated entirely by the *personal* good will of the individual stockholders toward the employees of their former corporation. While the logical implication that the payment was a dividend to the stockholders which they then gave to the ultimate recipients was not articulated by the Court, the Court in effect viewed the stockholders themselves (whose ratification was obtained not without reason), rather than Unopco, as the true payers. In that light, the question was simply whether a payment by the *former* stockholders of a corporation to the employees of that corporation should be treated as a gift or as income. The treatment of such a payment as a gift can be justified, as the Court in essence justified it, on the ground that the services were rendered to an entity (the corporation) which is treated for tax purposes as sepa-

rate and distinct from the stockholders.⁹ For present purposes, however, it is sufficient to note that the problem posed by such a stockholder payment is very different from that presented by a deductible payment made by a business entity for services received directly by it.

In the second place, to the extent that the language of *Bogardus* may be thought to have broader implications, its vitality has been seriously weakened by other decisions of this Court which, since that case was decided in 1937, have both significantly narrowed the concept of gifts and expanded the concept of income. Without now developing the point, we note, for example, that *Bogardus* was relied upon in *Helvering v. American Dental Co.*, 318 U.S. 322, 327, 331,

⁹ Since we do not treat a stockholder as being engaged in the business of his corporation for other purposes—and would not, for example, allow him to deduct compensation paid by him directly to an employee of the corporation—it is logical not to treat him as the recipient of the employee's services for purposes of characterizing his payment to the employee. If the payor is a stockholder at the time of the payment, arguably the payment might be treated as compensation to the employee, a contribution to capital by the stockholder (increasing the basis for his stock), and a deductible business expense by the corporation, but the complications of that characterization become even more difficult when the payor is no longer a stockholder. Again, the essential problem is one of correlating the several aspects of the transaction, and in the *Bogardus* situation that correlation is best achieved by treating the payment as a dividend to the stockholders and a gift by them to the employees. With that characterization, the income produced by the employees' services has been taxed to the corporation and would be taxable as a dividend to the stockholders. Were it taxable a third time on payment to the employees, there would be no compensating deduction and, in effect, the same income would be taxed once too often.

in support of a holding that cancellations of indebtedness were gifts whether or not "the motives leading to the cancellations were those of business or even selfish". Less than six years later, however, that decision was most severely limited by *Commissioner v. Jacobson*, 336 U.S. 28. See also *Commissioner v. LoBue*, 351 U.S. 243, 246-247, summarily rejecting a suggestion that stock options given employees might be gifts. On the income side, there has been a similar expansion of the concept of taxable receipts, culminating in the decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, and its implication that all "gains" are taxable unless expressly exempted. Against this development in the underlying concepts of gifts and income, *Bogardus*, we believe, can no longer stand as the final word on the tax treatment of voluntary payments made out of gratitude for past services, and the problem is one open for further consideration by the Court.

5. As our summary discussion indicates, these cases, although perhaps insignificant on their facts, turn ultimately on basic concepts of "What is income", and have a theoretical importance beyond that associated with more technical tax questions. The problem is of equal significance to the revenue. It cuts across the whole field of business gifts to individuals, e.g., severance pay, pensions, widow bonuses, employee bonuses, tips, Christmas gifts to buyers, finder's fees, reference fees to lawyers, kickbacks, etc. The payments involved are frequently large—in 34 litigated widow bonus cases, the payments totalled over \$1,000,000, an average of almost \$30,000 to each

widow¹⁰—and, since the issue is not simply who will be taxed on the business income given away but frequently whether it will be taxed at all, the effect on the revenue is directly proportional.

Finally, whatever the rule may be, it is important to the administration of the revenue laws that it be more clearly defined. The present lack of guiding principles and the *ad hoc* nature of the lower court decisions means that it is difficult to settle any particular case without litigation—a burden that bears upon the taxpayers, the Treasury, and the courts alike.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted. If the petition is granted, the Court may wish to set this case (and the *Stanton* case, if the forthcoming petition there is also granted) for argument together with and in advance of *United States v. Kaiser*, No. 55.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

GEORGE W. BEATTY,
Attorney.

SEPTEMBER 1959.

¹⁰ See note 6, *supra*. In two of the 36 cases there referred to, the amounts of the payments were not disclosed in the opinion.

APPENDIX A

No. 13,646

UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT

MOSE DUBERSTEIN, AND SYLVIA DUBERSTEIN, HUSBAND
AND WIFE, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT

Decided April 8, 1959

Before MARTIN, Chief Judge; MILLER, Circuit
Judge; and O'SULLIVAN, District Judge.

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of \$4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Ber-

man would ask questions about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Duberstein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk's accountant, prepared the 1951 tax

return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

"Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The Tax Court concluded as follows:

"Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

"He (Mr. Berman) told me that due to the fact that I—information that I had given him

was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted the Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrangements were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee". If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

"He * * * explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction.

The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 45 F. (2) 43 (45):

"We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford v. Commissioner of Internal Revenue*, 62 F. (2) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

"We have repeatedly held that the taxpayer has made out his case when he has put in proofs 'clearly and distinctly tending to show' a determining fact. * * * The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis, and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to

aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lunsford v. Commissioner*, supra, Judge Simons characterized such attitude as follows:

"At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to support the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

JUDGMENT

(Filed April 8, 1959)

On Petition to Review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 329—October Term, 1958

(Argued May 14, 1959. Decided July 6, 1959.)

Docket No. 25569

ALDEN D. STANTON AND LOUISE M. STANTON, APPEL-
LEES, v. UNITED STATES OF AMERICA, APPELLANT

Before: HAND, SWAN and HINCKS, *Circuit Judges*.

HAND, *Circuit Judge*:

The plaintiffs sue to secure a refund of \$15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In 1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was \$22,500. In November, 1943, he voluntarily resigned as Comptroller, and as president and director of the Operating Company, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as

Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars * * * provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of \$10,629.57. The plaintiffs eventually paid this with accumulated interest, \$15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although the donee had no right to enforce its payment. The last of our decisions in *Caragan v. Commissioner*, 197 Fed. (2) 246, 248, so declares and in *Nickelsberg v. Commissioner*, 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus v. Commissioner*, 302 U.S. 34, is the only

decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only \$4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus acquired." "Unopco" made a general distribution as a "gift" or "honorarium" of \$600,000 to all the former employees of "Universal," of which the plaintiff's share was \$10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. In the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was thought to have no such rights; but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in decid-

ing whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus v. Commissioner*, *supra*, at times, it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham v. Commissioner*, 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support an action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitative terms of whatever financial gains the pastor may have contributed to the corporation. *Schall v. Commissioner*, 174 Fed. (2) 893 (C.A. 5); *Mutch v. Commissioner*, 209 Fed. (2) 390 (C.A. 3); *Abernethy v. Commissioner*, 211 Fed. (2) 651 (C.A. D.C.). We cannot say positively that in the case at bar this second factor may not have had any place in the ac-

tion of the board of directors of the Operating Company; but, since Mr. Stanton's duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Commissioner's determination is wrong. *Welch v. Helvering*, 290 U.S. 111, 115; *Helvering v. Taylor*, 293 U.S. 507, 515; his decision is prima facie correct; *Wickwire v. Reincke*, 275 U.S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, *Circuit Judge* (dissenting):

In *Helvering v. American Dental Co.*, 318 U.S. 322, 327, it was said: "The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus v. Commissioner*, 302 U.S. 34, on the one side and upon the other by *Noel v. Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co. v. Commissioner*, 257 U.S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel*.

In *Bogardus v. Commissioner*, 302 U.S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the disbursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there *might be ground for the inference* that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would *necessarily* have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who had a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646 at 648-9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donees, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

In the *Noel* case, referred to in *Helvering v. American Dental Co.*, *supra*, as illuminating the dividing line from the other side, there were factors, not present here, which cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration."

Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

"* * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

"We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co. v. Commissioner*, 300 U.S. 37; *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481."

In the case now before us a search "among competing aims or motives [for] the ones that dom-

inated conduct" will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton into close personal contact* with the vestry and wardens of the church and with the directors of the Operating Company several of whom testified that a general feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate;** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus*, rather than more complete requital for past services, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general find-

*Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of "good will, esteem, or kindness" than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

**It was almost twice that later provided for his successor.

ing below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is *not* so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters v. Smith*, 3 Cir., 221 F. 2d 721; *Nickelsburg v. Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the Tax Court,* may not be disturbed unless clearly erroneous. *Plaut v. Munford*, 2 Cir., 188 F. 2d 543; *Smith v. Hoey*, 2 Cir., 153 F. 2d 846; *Scott v. Self*, 5 Cir., 208 F. 2d 125; *Smythe v. Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U.S. 102; *Wickwire v. Reinecke*, 275 U.S. 101; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir., 25 F. 2d 837; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keeffe v. Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters v. Smith*, *supra*, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

*26 U.S.C.A. § 7482(a) provides

"(a) *Jurisdiction*.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury: * * *"

Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appellate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both *Carragan v. Commissioner*, 2 Cir., 197 F. 2d 246, and *Nickelsburg v. Commissioner*, *supra*, are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

BRIEF FOR MOSE

DUBERSTEIN AND SYLVIA

DUBERSTEIN IN

OPPOSITION

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Office-Supreme Court, U.S.

FILED

OCT 19 1959

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. [REDACTED] 376

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

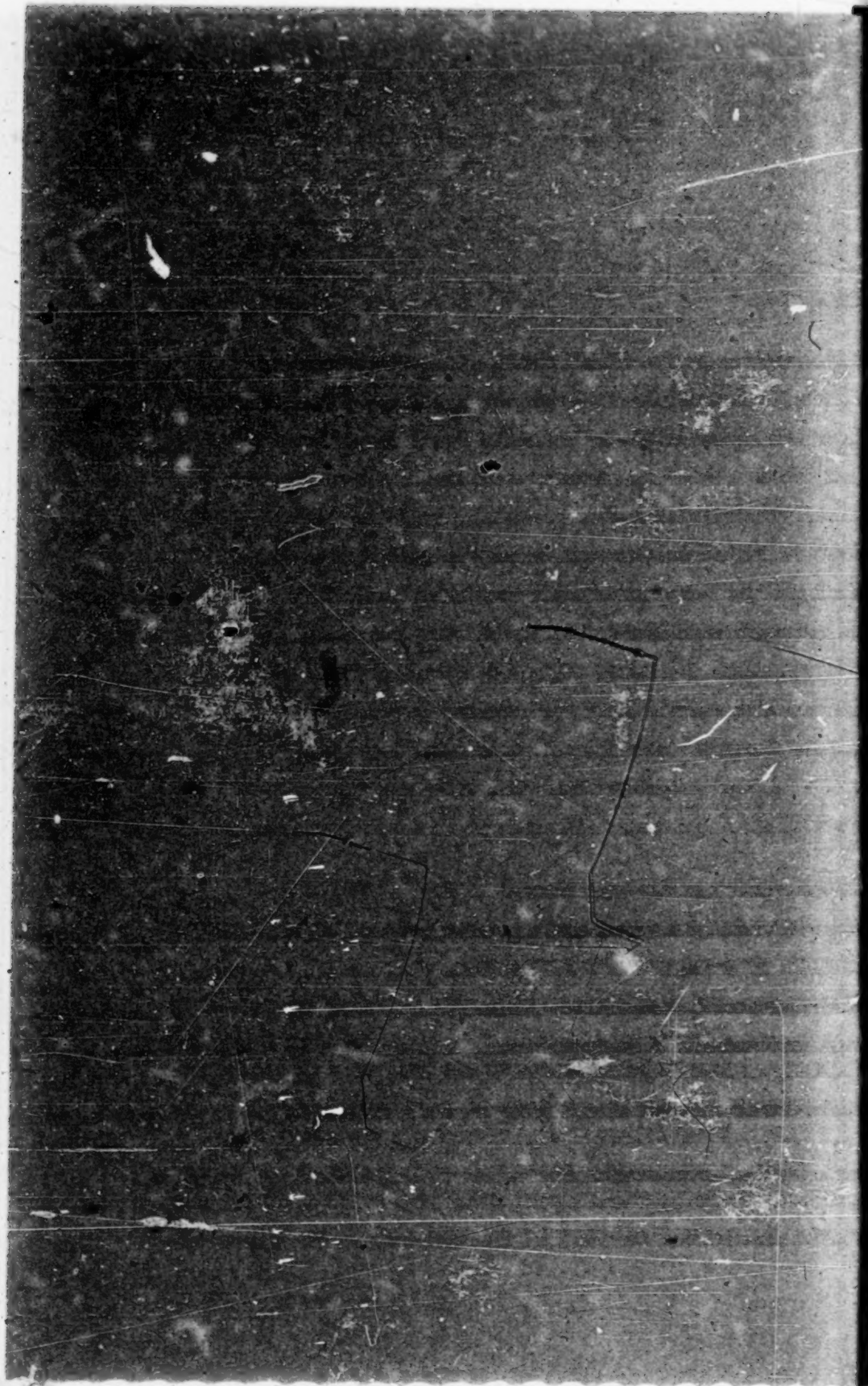
v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

**BRIEF FOR MOSE DUBERSTEIN AND SYLVIA
DUBERSTEIN IN OPPOSITION**

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton 2, Ohio,
Attorney for Appellants.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 176

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit

**BRIEF FOR MOSE DUBERSTEIN AND SYLVIA
DUBERSTEIN IN OPPOSITION**

OPINIONS BELOW

The findings of fact and memorandum opinion of the Tax Court are not officially reported. The opinion of the court of appeals is reported at 265 F. (2d) 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959, On July 7, 1959, by order of Mr. Justice

Brennan, the time within which to file a petition for a writ of certiorari was extended to and including September 5, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The taxpayer, in 1951, upon request of a friend of his, gave to the friend whose company did business with the taxpayer's company, some names of possible purchasers of the items the business friend's company wanted to sell, it appearing that the business friend's company did not know what firm or firms handled the items the business friend's company wanted to try to sell. Taxpayer gave him the information and it proved valuable to his business friend's company. The business friend then insisted upon taxpayer taking an automobile as a gift. When the business friend found out from his company's auditor that it would have to pay a tax on the automobile, he wanted to know from his company's auditor how it could avoid paying a tax and was told it could do so by way of a finder's fee. This was done. (*It was purely an after-thought.*) In 1954, the taxpayer learned for the first time that the cost of the automobile had been deducted as a business expense and the Government taxed the taxpayer for the value of the automobile. The question is, under these circumstances, whether the car was income to the taxpayer or a "gift" excludible under § 22(b)(3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.):

Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, voca-

tions, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . .

(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

.

(3) Gifts, bequests, and devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

.

STATEMENT

Duberstein Iron and Metal Company is a corporation located in Dayton, Ohio. Mohawk Metal Company is a corporation with its principal office in New York. Mose Duberstein, President of Duberstein Iron and Metal Company and Morris Berman, President of Mohawk Metal Company were personal friends. The corporations did business with each other over a period of years. Sometime in 1951 Berman called Duberstein and said that his company had some chemical and plastic products and wanted to know whether Mose Duberstein had any idea as to concerns who handle this type of products. Mose Duberstein gave him the names of some concerns that he thought might be interested in those kinds of products. This was done purely as a matter of friendship. Duberstein expected no monetary reward for telling his friend, Berman, the names of these concerns. Duberstein did not contact these concerns and Berman, at the time, evidently had no idea that he was beholden to Mose Duberstein for suggesting these names. Later on that year, Berman called Duberstein and informed him that

he wanted to give Duberstein an automobile. Duberstein stated that he didn't want an automobile because he had two and besides, Berman or his company owed him absolutely nothing because he had done nothing for them except as a friend he gave the names of some people who might be interested in the products Berman was asking about. However, Berman insisted that Duberstein take the automobile, which he did, and that is the last he, Duberstein, heard of the matter until in 1954, when an examiner for the Internal Revenue Department told Duberstein that he had to pay a tax on the automobile, the fair value of which the agent said was \$4,250.00, which tax Duberstein refused to pay, and the matter finally went to the Tax Court by reason of a suit filed by the Taxpayers.

The Tax Court found that the car was income to Mr. Duberstein in the amount of \$4,250.00 in the year 1951, and found the Petitioner liable for income tax thereon in the amount of \$2,570.48 for the year 1951.

The United States Court of Appeals for the Sixth Circuit reversed. The record in the case is very short. The only witnesses were Mose Duberstein and his accountant, David E. Flagel, and the Government offered no testimony or evidence whatsoever.

The complete testimony is as follows:

Mose Duberstein—Direct

“Q. Mr. Duberstein, state whether or not you are the president of the Duberstein Iron & Metal Company, an Ohio corporation located at Dayton, Ohio? And talk loud so that His Honor can hear you. A. I am.

Q. That isn't very loud. How long have you been the president? A. For 25 years.

Q. Mr. Duberstein, state whether or not your company had during the years 1950 and '51, and prior thereto, business dealings with the Mohawk Metal Corporation? A. Yes, we did.

Q. And what were those business transactions? A. The business transactions with the Mohawk Metal Company were strictly on the basis—

Q. Well, buying and selling what? A. Buying and selling copper, or various other metals.

Q. Now, state whether or not most of these transactions were done by phone? A. All of them, practically.

Q. Did you know Mr. Berman personally? A. Yes, I did.

Q. And how long did you know him, or have you known him? A. I'd say about 7 years.

Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.

Q. What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexiglas, and another was polyethylene, nickel salts.

Q. Now, state whether or not this information was given to him gratuitously and without any hope of monetary reward or gift of any kind? A. I expected nothing in return.

Q. Talk up. A. I expected nothing in return for—

Q. Now, back in 1951 state whether or not Berman called you with reference to a Cadillac automobile?

A. He did and I told him at the time that—

Mr. Biltz: Objection, Your Honor. That is hearsay conversation with Mr. Berman.

By Mr. Kusworm:

Q. State what you said to Mr. Berman, and what Berman said to you.

Mr. Biltz: Objection.

Mr. Kusworm: We think this is very competent.

The Court: The objection is overruled at this time. If I find it is incompetent I can always ignore it.

A. He [Morris Berman] told me that due to the fact that I—the information that I had given him was so

helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

By Mr. Kusworm:

Q. Now, at the time, did you need any automobile?

A. No; I had two cars.

Q. What kind? A. I had a Cadillac, and an Oldsmobile.

Q. State whether or not at any time you or any member of your company to your knowledge received from Mohawk or it's auditor or certified public accountant a form No. 1099? A. I never received it.

Q. Showing this transaction. A. Not at all.

Q. Now, what was your custom, and is your custom when any form 1099, or any other forms concerning taxes are sent to your company, or to you by the Government? A. Well, they are immediately turned over, or mailed directly to the auditor, and he handles it from there on.

Q. Had you received form 1099 in 1952 state whether or not you would have contacted Berman immediately?

A. Oh, I definitely would.

Q. Why? A. Because I didn't owe anything, any money. This car was strictly a gift, and I would have tried to straighten out the matter with him. Or if I had received that form 1099.

Mr. Kusworm: You may cross-examine.

CROSS-EXAMINATION

By Mr. Biltz:

Q. Mr. Duberstein, this information, I believe you testified, proved valuable to Mohawk. Is that correct? That you furnished them in 1951? A. It was a matter of information. He asked me for information as to where he could dispose of that type of material.

Q. Had you not given him this information would you still have gotten this Cadillac car? A. Oh, I don't—

Q. You don't think so? A. I don't think so.

Q. No. I don't think so either. Do you know anything about how Mohawk treated this item on their income tax return, or— A. I have no knowledge of that.

Q. You have no knowledge of that. A. No.

Q. Do you have any knowledge of anything with reference to the corporate minutes of the Mohawk Metal Company? A. Not at all.

Q. You made no attempt even after the investigation to find out whether this was income or a gift; is that correct?

Mr. Kusworm: Object.

A. I didn't know that information until 1954.

By Mr. Biltz:

Q. '54? A. Until the Internal Revenue Department contacted me.

Q. What is a form 1099, do you know? A. I'm not too familiar with it.

Q. You are not familiar with it. A. No.

Mr. Biltz: That is all.

REDIRECT EXAMINATION

By Mr. Kusworm:

Q. State whether or not you ever got any form from anybody showing a tax indebtedness to the Government because of a gift? A. No, I never did.

Q. Now, state whether or not after you got this information you contacted Mr. Flagel, and whether or not to your knowledge he made an investigation as you have been interrogated about by the distinguished attorney for the Respondent? A. Well, after I was contacted by the Internal Revenue Department I contacted Mr. Flagel, and he handled the matter from there on in, and he contacted the auditor of the Mohawk Metal Company.

The Court: Who is Mr. Flagel?

The Witness: He's our auditor. He's my C.P.A.

The Court: He's your auditor.

The Witness: That is right.

The Court: Accountant.

The Witness: Our accountant, that's right.

The Court: Very well.

Mr. Kusworm: That's all, Mr. Duberstein,

(Witness excused.)

Mr. Kusworm: I call Mr. Flagel.

David E. Flagel,

called as a witness for, and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: May we have your name and address, please?

The Witness: David E. Flagel.

The Clerk: Your address?

The Witness: 327 First National Building, Dayton, Ohio.

DIRECT EXAMINATION

By Mr. Kusworm:

Q. Mr. Flagel, you are a Certified Public Accountant with offices in the First National Bank Building at Dayton, Ohio? A. Yes, sir.

Q. Now, you have to talk loud. The Judge has told you the acoustics here are bad. A. Yes, sir.

Mr. Kusworm: I happen to know that myself, Your Honor, from previous experience.

By Mr. Kusworm:

Q. How long have you been a Certified Public Accountant? A. Since 1936.

Q. State when Mose Duberstein of the Duberstein Iron & Metal Company first contacted you about the automobile in question. A. Sometime during 1954.

Q. State whether or not you were ever given by Mose Duberstein or the Duberstein Iron & Metal Company a form 1099? A. No.

Q. State what the custom is of Duberstein Iron & Metal Company and/or Duberstein with reference to turning such notices over to you. A. He usually

turns over to me any papers or matters pertaining to taxes so that I can take care of them from that point on.

Q. Now, in 19——

The Court: Just a minute. You take care of the tax accounts and returns of both the corporation and Mr. Duberstein individually?

The Witness: Yes, sir; for the corporation and for all of the personal returns.

The Court: Very well. Very well.

By Mr. Kusworm:

Q. Now, Mr. Flagel, when this matter was reported to you by Duberstein and/or the Duberstein Iron & Metal Company, state what you did with reference to getting the story of the transaction from Mose Duberstein. A. Well, first——

Mr. Biltz: From Mose Duberstein?

Mr. Kusworm: Yes.

Mr. Biltz: I object, Your Honor. Those would be self-serving declarations.

Mr. Kusworm: I'm asking what he did.

The Court: I understand that; I understand he will go ahead and give me the whole picture. State what you did in regard to Mr. Duberstein.

A. (Continued) Well, I discussed the matter first with Mr. Duberstein to get the whole story from him before discussing it further with the agent, with the internal revenue agent.

By Mr. Kusworm:

Q. Now, what did Duberstein tell you? A. He explained that the automobile was unquestionably a gift, and one of the questions which I asked was whether he had ever received any information on form 1099 or any other information. Mr. Duberstein explained to me that he had talked to Mr. Berman many times during the interim between '51 and '54, and the question of compensation or taxability of the Cadillac had never arisen.

The Court: Now, then, after that did you contact Mr. Berman, or Mohawk in regard to it?

The Witness: Yes, sir.

Mr. Kusworm: I am coming to that.

A. (Continued) I wrote a letter to Mr. Berman—
By Mr. Kusworm:

Q. Now, in answer to His Honor's questions I want you to read a letter. State whether you sent it by registered mail to Mr. Berman, and exactly word for word let the record show what that letter contained.

A. Well, first I'd like to mention—Well, all right.

I wrote a letter on May 4th, 1954, and sent it to Mr. Morris Berman, 30 West 90th Street, New York, and it was sent special—it was sent registered.

Q. Have you got the receipt? A. We have the receipt for it.

Q. Read it. A. "Dear Mr. Berman: Mr. Mose Duberstein, who has been my client for many years, suggested that I write to you in connection with the audit by the Internal Revenue Department of his 1951 personal Federal income tax return.

"The agent making the examination has the information from the New York office to the effect that the Mohawk Metal Corporation paid Mose Duberstein \$4,250.00 during the year 1951 in the form of a Cadillac automobile, and deducted this item as an expense.

"In order to verify this, I corresponded directly with your accountant, Mr. Seymour Gorin, in Philadelphia. On May 1, 1954 he advised me that the Mohawk Metal Corporation did deduct this item as an expense on its Federal income tax return for that year. Also, that an information return on form 1099 was filed reporting this payment as income to Mose Duberstein. Mr. Gorin also gave me an excerpt of a letter which was given by Mohawk to the Internal Revenue Department in New York on September 9, 1953 stating that this payment was made to Mose Duberstein in the nature of a finder's fee.

"I have discussed this matter at great length with Mose Duberstein and he has assured me that it was his definite understanding and your understanding, also, that this car was given to him strictly as a gift. He at no time considered himself as employed by Mo-

hawk, had no agreement for compensation, and there was never any legal liability to pay him. As a matter of fact, he would not have considered accepting the car under any circumstances other than as a gift. On the basis of compensation he would incur a very substantial tax liability. Mose Duberstein never considered that he as an individual was rendering any service to Mohawk. All business transactions in the past have always been between Mohawk Metal Corporation and Duberstein Iron & Metal Company. When Mose Duberstein was told of the Cadillac purchased for him, he naturally assumed it was a gift and accepted it as such.

"I would appreciate hearing from you regarding this matter at your earliest convenience.

"Very truly yours."

Q. Was that letter ever answered? A. No, sir.

The Court: You've read the letter in full?

The Witness: Yes, sir.

The Court: Very well.

By Mr. Kusworm:

Q. Now, further carrying out the question of His Honor, did you follow through on this matter with Mr. Gorin, who was the accountant for Mohawk, and let's tell His Honor what you did about that. A. I, also, corresponded with Mr. Gorin. I wrote to Mr. Gorin several times. I finally received one answer.

The Court: Well, rather than read those into the record why don't you offer them, offer copies of the letters?

Mr. Kusworm: Very well, Your Honor.

The Court: Or offer the—

Mr. Kusworm: We will offer them.

The Court: The originals, I take it, are not in your hands.

Mr. Kusworm: They are not. But we will offer in evidence, Your Honor, to show the actions of the Certified Public Accountant for the tax payer—

The Court: Do you have any objection?

Mr. Biltz: I would like to see that last letter he was going to read.

The Court: You have no objection if these copies——

Mr. Kusworm: I want to show the letter to the accountant first.

The Witness: Well, I wrote several letters to him, Mr. Kusworm. Which one——

Mr. Kusworm: Now, this——

The Witness: I wrote my last letter on August 26, I believe, of 1956.

Mr. Kusworm: Here's the letter that he just——

By Mr. Kusworm:

Q. There was one that you wrote July 2nd, 1955. Is that right? A. Yes, sir.

The Court: If you gentlemen can agree, that is, if you have no objection, it would be better to have the letter, itself, in the record, than reading it.

Mr. Biltz: Yes, it would. I would like to see that last letter.

Mr. Kusworm: Yes. We would like to offer in evidence, Your Honor, all of these letters.

The Court: And the reply.

Mr. Kusworm: And the reply. For the reason that——

By Mr. Kusworm:

Q. You, Mr. Flagel, had a talk with Mr. Gorin, didn't you? A. Several talks.

Q. Several talks with him. And what did Gorin say? A. Gorin said substantially—well, the last talk I had with him was on September 6 of 1956.

Q. What did he say about the reason why this was put on Mohawk's books? A. Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and——

Mr. Biltz: Objection, Your Honor. He's——

The Court: It will be sustained.

If Mr. Biltz doesn't object to those letters, I'll permit you to offer copies.

Mr. Biltz: I believe I'll object to the letters, too, Your Honor. They are self-serving declarations, they

are hearsay, and they are trying to prove the donor's intent by statements of the donee, his accountant. They have neither the donor nor his accountant here.

The Court: Well, the only testimony—I am not going to permit you to state what—Who is this man with Mohawk?

Mr. Kusworm: Gorin.

The Court: What Gorin said to you, but if you have any letters there—

Mr. Kusworm: Yes, we have a letter.

The Court: Over his signature, I thought perhaps you could agree that they could be introduced into evidence.

Mr. Kusworm: We have letters that Flagel wrote Gorin in which Flagel corroborated what Gorin told him personally over the phone.

The Court: Have you looked at that letter?

Mr. Biltz: I've looked at that letter, that one letter of May 1st is all right. We have no objection to it.

Mr. Kusworm: No, you haven't any objection to it. Then, we want all the correspondence. I think the Court ought to have all the facts in this case.

The Court: Well, have you other letters there?

Mr. Kusworm: Yes, Your Honor.

The Court: Take a look at them, and see if you have objection to the other letters. I mean Mr. Biltz, I don't care about this man. Mr. Biltz, look at those letters.

Mr. Kusworm: He can look at the whole file, Your Honor. We have nothing to hide in this case. I'm willing to introduce Flagel's file on this case. In other words, I think that this Tax Court ought to have all the facts.

The Court: Well, in order for me to get the facts I've got to have—these conversations you are going to outline to me, I don't know whether they would testify that those are facts or not.

Mr. Kusworm: They are all reflected in the letters, Your Honor.

The Court: Well, I want the letters.

Mr. Kusworm: We want to introduce the letters. We want to introduce the whole file.

The Court: Well, the Court is trying to find out whether or not counsel for the Respondent will object to those letters. If he don't why, we'll have them in evidence.

Mr. Biltz: We would like Counsel to take each letter and introduce each letter separately, letter by letter, so that we could determine at the time which letters we would like to have in evidence and which ones we have objection to.

The Court: Well, if you're going to object to any of those letters from Mr. Gorin—is that his name? I don't want you to object to one—

Mr. Biltz: I think we should object to all of them. They are hearsay.

Mr. Kusworm: Well, they are letters between the parties, or their representatives, Your Honor, and it seems to me that the Government would want Your Honor to know all the facts in this case.

The Court: I know, but that is not testimony. They don't have an opportunity to cross-examine the witnesses or anything of the kind. You know that those are not proper evidence, and unless they will waive their objection, they are not admissible. I can't admit them. They are not sworn to, and, then, the Respondent doesn't have any opportunity to cross-examine them, or get them to explain their statements or anything of the kind.

Now, if you expected to use them as witnesses you should have had them here.

Mr. Kusworm: Well, now, if Your Honor please, I would like to explain something to you. To have Berman here would have been futile. Berman didn't even answer that. Now, I'm going to come to Gorin—I am coming to Gorin. We contacted Gorin on the basis of what he said to Flagel, and Gorin said he wouldn't come here.

The Court: Well, you could have subpoenaed him.

Mr. Kusworm: I know we could have subpoenaed him, but I know what he would have repudiated.

The Court: You could take his deposition.

Mr. Kusworm: That's right, but he would have repudiated it. And the bald statement of the record right now is that this was purely and simply a gift, and let the Government refute our testimony on that point if they are objecting to the letters.

I want to ask you a question.

The Court: I will permit Mr. Berman's testimony to stand, but I am not going to permit the introduction of those letters at this time.

Mr. Kusworm: I understand that, Your Honor.

The Court: I am not going to permit you to read them into the record either.

Mr. Kusworm: I understand that, Your Honor. But you will permit me to take an exception.

The Court: Yes. I will note your exception.

Mr. Kusworm: Thank you.

By Mr. Kusworm:

Q. I want to ask you this final question: Had you gotten form 1099 what would you have done with respect to that matter? A. I would have—

Q. In 1952. A. I would have advised Mr. Duberstein that that item was income to him for the year '51 and included it as such in his 1951 return.

Mr. Kusworm: You may cross-examine.

CROSS-EXAMINATION

By Mr. Biltz:

Q. If you would have later received the form 1099 would you have still—would you have filed an amended return? A. How much later?

Q. A couple years, two years. A. I would have advised Mr. Duberstein about it, and if it was determined to be income to him for the year '51, an amended return would have been filed, yes.

Q. Did Mr. Berman advise you that he had sent that 1099 to Mr. Duberstein? A. I never talked with Mr. Berman, or I never received an answer to my registered letter.

Q. Do you know whether Mohawk sent a form 1099? A. I don't know.

Q. You have no knowledge of that. A. I do know this, but it has to be through my telephone conversation with Mr. Gorin. Now, he explained to me that he did send 1099s out and he sent them all by registered mail, and he couldn't find the receipt for this particular 1099 although he told me he had receipts for all the other 1099s that he sent out.

Mr. Biltz: That is all.

Mr. Kusworm: That is all.

(Witness excused.)

Mr. Kusworm: We rest.

The Court: Before you rest I want to ask Mr. Duberstein, what did you do with this Cadillac, Mr. Duberstein, after you received it?

Mr. Duberstein: What did I do with it? I used it officially.

The Court: Well, you had a Cadillac, you had an Oldsmobile, so you kept all three of them.

Mr. Duberstein: Yeah, I kept all three of them.

The Court: Very well.

The Petitioner rests?

Mr. Kusworm: The Petitioner rests.

The Court: Very well.

Mr. Biltz: The Respondent had subpoenaed a witness but the witness, we didn't give him enough time to appear, and we don't believe he is necessary anyhow, and the Respondent rests."

ARGUMENT

In the light of this testimony, the United States Court of Appeals for the Sixth Circuit decided as follows:

“UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN, HUSBAND
AND WIFE, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT
ON PETITION FOR REVIEW OF THE TAX COURT

Decided April 8, 1959

Before MARTIN, Chief Judge; MILLER, Circuit Judge;
and O'SULLIVAN, District Judge.

O'SULLIVAN, District Judge. The sole question in this case is whether a Cadillac automobile received by the taxpayer Duberstein in the year 1951 from Mohawk Metal Corporation, was a gift or taxable income. The Tax Court found that it was not a gift, and affirmed the action of the Commissioner of Internal Revenue in assessing a deficiency against Duberstein by including in his 1951 income the sum of \$4,250.00, the fair market value of the Cadillac.

Duberstein was President of Duberstein Iron and Metal Company of Dayton, Ohio, and Morris Berman was President of Mohawk Metal Corporation of New York. These two corporations had done business with each other in the buying and selling of various metals over a period of years. Duberstein and Berman were personally acquainted. On some occasions when these two corporate officers were talking to each other, Berman would ask questions about names of consumers who used various chemicals. Duberstein gave Berman the names of such consumers known to Duberstein. At some time in the year 1951, Berman called Duberstein and told him that some of the information given to Berman was so helpful that he felt he wanted to give

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 26-29) are not officially reported. The opinion of the court of appeals (R. 30-34) is reported at 265 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 29). On July 7, 1959, by order of Mr. Justice Brennan, the time within which to file a petition for a writ of certiorari was extended to and including September 5, 1959 (R. 35). The petition was filed on September 4, 1959, and granted on December 14, 1959 (R. 35). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The taxpayer, upon request, gave to a business corporation the names of potential customers. The information proved valuable and the corporation reciprocated by giving the taxpayer a Cadillac. The question is whether the car was income to the taxpayer or a "gift" excludible from income under § 22 (b) (3) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise,

or inheritance (but the income from such property shall be included in gross income);

STATEMENT

Respondent¹ was the president of the Duberstein Iron & Metal Company of Dayton, Ohio. He was personally acquainted with Morris Berman, the president of the Mohawk Metal Corporation, the two companies having done business with each other over a period of years. The business transactions between the two companies (buying and selling metals) were conducted primarily by telephone. In the course of such conversations, Berman occasionally asked respondent for the names of concerns that used certain chemicals sold by Mohawk, and respondent supplied the names of those he knew. Respondent expected nothing in return for such information (R. 14). In 1951, Berman called respondent, and the following conversation, as related by respondent, took place (R. 14):

He told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car.

¹ Mose Duberstein will be referred to as the sole respondent, his wife being a party only because she filed a joint income tax return with him.

Respondent testified that he didn't think he would have been given the car had he not furnished the information to Mohawk (R. 15).

Mohawk deducted the cost of the car on its income tax return as a business expense in the nature of a "finder's fee" and filed an information return (Form 1099) reporting it as compensation paid respondent (R. 19, 26). Respondent treated the car as a gift and did not report it as income.²

In deficiency proceedings, the Tax Court upheld the Commissioner's determination that the car was taxable income to respondent, finding no evidence that it was intended as a gift (R. 26-29). The court of appeals, with Chief Judge Martin dissenting, reversed, holding that respondent's account of the telephone conversation was "clear and distinct evidence of the donative intent of Berman" and, being uncontradicted, required a finding of a gift excludible from income under § 22(b)(3) of the Internal Revenue Code of 1939 (*supra*, pp. 2-3).

SUMMARY OF ARGUMENT

1. The primary question in this case is whether the

² When respondent's return was later questioned, his accountant (Flagel) spoke to Mohawk's accountant about Mohawk's treatment of the item. Asked what the latter had said about the reason why the item was recorded as a finder's fee, Flagel testified (R. 21):

Well, he had talked with Mr. Berman, and explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible, and—

Although an objection to the testimony as hearsay was sustained, it was relied on by the court of appeals (R. 33) and we do not object to its use here.

characterization of a voluntary payment as a gift or income turns upon the payor's *motive*, in the sense of the reasons why he makes the payment, or upon his *intent*, in the sense of what he intends the payment to be. Both courts below thought intent controlling, disagreeing only on whether the fact that Berman called the payment a "gift" at the time (showing a "donative intent") or the fact that the corporation later deducted it as a "finder's fee" (showing an intent to compensate) more accurately revealed the payor's "intent." We eschew that controversy and will assume that Berman, to the extent that he had the capacity to do so, "intended" the payment "as a gift". Our position is rather that it is motive, not intent, that is controlling and that the reason for the payment here (Mohawk's gratitude for the valuable information given it by respondent) requires its characterization as compensation.

2. As used in property or contract law, "intent" refers to the legal relationships intended to be created by an act, and "donative intent" means simply the intent to convey full beneficial ownership, as distinguished, for example, from an intent to make a loan or to create a trust. Since the transfer here would admittedly have the same effects upon the legal relationships between the parties whether it was intended "as compensation" or "as a gift," it is evident that it was not in that sense that the courts here used "intent." Rather, "intent" was used to mean a desire, not that any act should be done differently or have any different consequences, but only that the thing

done should "be" one thing or another without otherwise affecting its consequences.

We submit that "intent" in that sense is not a meaningful concept and that a statement by a payor that "I intend the payment to be a gift rather than compensation" can reflect, at best, only the payor's conclusion that the payment qualifies as a gift under the tax definition or, at worst, simply the payor's desire that it not be taxable. Clearly, neither is relevant to the proper tax treatment of the payment, and in our view the first step to a meaningful analysis of the problem is to discard the "intent" formulation and focus instead on the only substantial differentiating element of voluntary payments—namely, the reasons why the payor makes the payment, *i.e.*, motive. In fact, we believe, this Court has already held as much in *Commissioner v. LoBue*, 351 U.S. 243, and all that remains to be done is to make that decision's meaning unmistakably plain by rejecting once and for all the futile search for "intent".

3. If motive is, as we contend, controlling here, it clearly requires the characterization of the payment to respondent as compensation. From the record, there is no doubt that the reason for the payment was simply Mohawk's gratitude for the commercially-valuable information given it by respondent, a gratitude that involved, not the personal emotions of the payor, but only the common sense of obligation to reciprocate for an economic benefit received from another. If any voluntary payment can be compensation, then one so motivated must be, for no more direct causal relationship between the performance of the

act and the receipt of the payment seems possible without the payment having been expressly bargained-for or anticipated.

ARGUMENT

I

INTRODUCTION

It has long been accepted doctrine, and is not questioned here, that a payment made without obligation and not in exchange for a bargained-for consideration is not necessarily a "gift" within the meaning of the § 22(b)(3) exclusion and may be taxable as income.³ The problem posed by this case, in common with *United States v. Kaiser*, No. 55, and *Stanton v. United States*, No. 546, is that of distinguishing between those voluntary payments which are gifts for Federal income tax purposes and those which are not.

The aspect of the problem most sharply presented by this case is that of identifying the kind of facts upon which the legal conclusion depends. More specifically, the primary question in this case is which element of a payment should control its characterization as a gift or as income: the "motive" of the payor, in the sense of the reasons why he decides to make the payment; or the "intent" of the payor, in the sense of what he intends the payment to be. The evidence in this case as to each of those elements was as follows:

³ E.g., *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730; *Bogardus v. Commissioner*, 302 U.S. 34. The statements in *Bogardus* that "gifts" and "compensation" are mutually-exclusive categories and "there can be no such thing under the statute as a taxable gift" (pp. 39-40) are not to the contrary, for the Court was there referring to "gifts" within the meaning of § 22

Motive: Berman, the president of Mohawk, told respondent (as recounted by him) that "due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me" something (R. 14). Respondent didn't "think" he would have been given the car had he not given Mohawk the information (R. 15).

Intent: Berman told respondent that he wanted to give him "a present" and that he had a Cadillac "as a gift" (R. 14). The court of appeals also found in the record an indication that Berman spoke of the car as a "gift" in later talking to Mohawk's accountant (R. 33). Mohawk deducted the payment on its income tax return as a "finder's fee," and filed information forms reporting the payment to respondent (R. 19, 26).

To both courts below, although they arrived at opposite results, the element of the payment that controlled its characterization was the "intent" with which it was made. In the Tax Court's view, the testimony that Berman had called the payment a "gift" was overcome by the treatment of the payment on the books of the corporation and its deduction on the tax return, which it thought tended strongly "to negate any donative intent of the payor" (R. 28). The court of appeals, on the other hand, found in Berman's contemporaneous statement "clear

(b)(3), and not to common law concepts of gifts. All the statement meant was that if a payment were excluded from income by § 22(b)(3) it could not be brought back into income by another route, so that the sole question was the application of § 22(b)(3)."

* Based on the testimony set forth in note 2, *supra*.

and distinct evidence of the donative intent of Berman at the time" and held that, there being a donative intent then, a subsequent "change of mind" by the donor could not change the character of the payment (R. 32).

It is not our purpose in this brief to enter into the area of disagreement between the Tax Court and the court of appeals—whether what Berman called the payment at the time or the way in which the corporation reflected it on its books more accurately reveals the "intent" with which the payment was made—and we assume with the court of appeals that Berman, so far as he was able to do so, "intended" the payment "as a gift." Our position is rather that the payor's "intent," in that sense, is irrelevant, and that it is upon the reasons for the payment, i.e., motive, that its characterization should turn. We shall show, finally, that the reasons for the payment here preclude its characterization as a "gift".

II

WHETHER A PAYMENT IS A "GIFT" FOR FEDERAL INCOME TAX PURPOSES DEPENDS ON THE REASONS WHY IT WAS MADE, NOT ON WHAT IT WAS "INTENDED" TO BE

1. In contract or property law, "intent" is normally used to denote the legal relationships desired to be created by an act—e.g., an intent to create a binding contractual obligation. It is in that sense that "donative intent" or an intent "to make a gift" is generally used, meaning simply an intent to convey a beneficial interest in property without imposing any duties upon, or affecting any other rights of,

the recipient. Upon its presence or absence depends, for example, whether the action is effective to convey title or only possession (a bailment); whether the transferee receives an unrestricted beneficial interest or must hold the property for designated uses (a trust); whether the transferee is under a duty to make an equivalent repayment (a loan); or whether a pre-existing obligation of the payor survives the payment or is discharged (a payment of a debt).⁵

It is obvious, of course, that it was not in that sense that "donative intent" was used by the courts here, for it was unquestioned that the transfer would be equally effective to pass title whether it was intended "as compensation" or "as a gift". On the other hand, since the common premise of both courts was that, with given reasons for making the payment, Mohawk could nevertheless "intend" it either "as a gift" or "as compensation," "intent" must refer to something different from the reasons for the decision to perform the act. Thus, "intent" as used here does not mean an intent that any act should be done differently or have any different consequences, but only that the thing done should "be" one thing or another without otherwise affecting its consequences.

We submit that in looking for such an "intent" the courts are looking for something that does not exist—i.e., that an intent to do an act "as" one thing or another, when both the act and its consequences are

⁵ For examples of that usage, see Scott, *Trusts* §§ 23, 25, 31, 125 (2d ed. 1956); 2 Williston, *Contracts* § 439 (Rev. ed. 1936); Thornton, *Gifts and Advancements* §§ 70, 234. (1893).

to be the same, is not a meaningful concept. That becomes evident from an examination of what a payor might mean by the statement that "I intend the payment to be a gift and not compensation." In our view, that statement, however sincerely said or felt, can only reflect (1) the payor's habits of speech; (2) his choice of a euphemism; (3) his conclusion that the payment in fact qualifies as a gift under the tax or some other definition; or (4) his recitation of words he has been told will make the payment non-taxable. So analyzed, it is evident that such a statement (or state of mind) has no relevance to the proper tax treatment of the payment, yet it is precisely upon such accidents (or choices) of language that the result must ultimately turn if "intent" is to be the test.

It is, we believe, primarily because the lower courts have posed the question as one of "intent" that the decisions in this area, for all of their number, have failed to develop meaningful standards of decision.*

* By and large, the opinions in this area do not articulate the grounds for decision beyond listing the admitted evidentiary facts as "evidence," and then drawing a conclusory "inference" of "intent". Being unable to define what they mean by "intent", however, the courts have understandably been unable to agree on what is the best "evidence" of it. It has been held, for example, to be important by some courts but immaterial by others: that the payor deducted the payment (compare *Willkie v. Commissioner*, 127 F. 2d 953, 956 (C.A. 6), certiorari denied, 317 U.S. 659; *Bausch's Estate v. Commissioner*, 186 F. 2d 313, 314 (C.A. 2); *Poorman v. Commissioner*, 131 F. 2d 946, 949 (C.A. 9); *Silverman v. Commissioner*, 28 T.C. 1061, 1066; with *Bounds v. United States*, 262 F. 2d 876, 882 (C.A. 4); *Hellstrom v. Commissioner*, 24 T.C. 916, 919); that the payments were not ratified by the stockholders (compare *Noel v. Parrott*, 15 F. 2d 669, 671 (C.A. 4), cer-

In our view it is an essential first step to any further clarifying developments that the formulation of the question as one of the payor's "intent" be discarded and attention be focused on the more substantial differentiating aspects of voluntary payments.

certiorari denied, 273 U.S. 754; *Botchford v. Commissioner*, 81 F. 2d 914, 916 (C.A. 9); *Fitch v. Helvering*, 70 F. 2d 583, 586 (C.A. 8); *Yuengling v. Commissioner*, 69 F. 2d 971, 972 (C.A. 3); *Walker v. Commissioner*, 25 T.C. 832, 837; with *Lunsford v. Commissioner*, 62 F. 2d 740, 742 (C.A. 6); *Macfarlane v. Commissioner*, 19 T.C. 9; that the widow of an employee had not herself performed services (compare *Bounds v. United States*, *supra*; *Lunsford v. Commissioner*, *supra*; *Luntz v. Commissioner*, 29 T.C. 647, 650; with *Simpson v. United States*, 261 F. 2d 497, 501 (C.A. 7), certiorari denied, 359 U.S. 944; *Farmedoe v. Allen*, 158 F. 2d 467, 468 (C.A. 5), certiorari denied, 330 U.S. 821; *Fisher v. United States*, 129 F. Supp. 759, 762 (D. Mass.)); and that death benefits paid to a widow or the employee's estate were based on the amount of his salary (compare *Simpson v. United States*, *supra*; *Bausch's Estate v. Commissioner*, *supra*; *Willkie v. Commissioner*, *supra*; *Jackson v. Commissioner*, 25 T.C. 1106, 1111; with *Bounds v. United States*, *supra*; *Hellstrom v. Commissioner*, 24 T.C. 916, 919). Perhaps most unclear of all is the weight given to the payor's own characterization of the payment as a gift or as compensation, which may from time to time be controlling, significant, inconclusive, or immaterial. See, e.g., the present case; *Botchford v. Commissioner*, *supra*; *Bounds v. United States*, *supra*; *Wallace v. Commissioner*, 219 F. 2d 855, 858 (C.A. 5); *Lincoln Nat. Bk. v. Burnet*, 63 F. 2d 131, 133 (C.A. D.C.).

Nor is there even agreement over the nature of the ultimate question as one of "fact", subject to review only under the "clearly erroneous" standard or to be left to the jury, or as one of law or of mixed law and fact, on which the appellate courts may draw their own conclusions from the evidentiary facts. Compare *Peters v. Smith*, 221 F. 2d 721 (C.A. 3); *Neville v. Brokrick*, 235 F. 2d 263, 266 (C.A. 10); *United States v. Bankston*, 254 F. 2d 641, 642 (C.A. 6); with *Bogardus v. Commissioner*, *supra*; *Bounds v. United States*, *supra*; *Simpson v. United States*, *supra*; *Willkie v. Commissioner*, *supra*.

2. If some but not all voluntary payments are gifts, the only meaningful basis for differentiating among them, we submit, is the payor's motive, the answer to the question "Why did the payor decide to make the payment?". The difference between a Christmas check given to a son and one given to an employee is not that the payor does not "intend" the payment as a gift in both cases—to the extent that he is able, he very likely does—but that one is prompted solely by personal affection towards the payee and the other, at least usually, by either anticipated benefit to the payor (encouraging the particular employee to remain or generally creating employee good will) or his sense of gratitude for the valuable services performed by the payee. And if one payment is a gift and the other compensation, it must be because of that difference in the reasons for the payment.

Although the lower courts seem to have overlooked their implications, the recent decisions of this Court, we believe, fully support our analysis and make clear that it is the reasons why a voluntary payment is made, and not what it is intended "to be," that should control its characterization. In *Robertson v. United States*, 343 U.S. 711, 713-714, for example, a gift was alluded to as a payment given "out of" (i.e., motivated by) "affection, respect, admiration, charity or like impulses." Even more significant is the decision in *Commissioner v. LoBue*, 351 U.S. 243, holding employee stock options to be taxable as compensation. Lower court decisions had held that the taxability of a stock option depended on whether it was intended "as compensation" or only to give the employee "a

proprietary interest in the corporation." This Court found the distinction in terms of "intent" to be without substance. The options, the Court held, could not be "gifts" because there was no indication "of the kind of detached and disinterested generosity that might evidence a 'gift' in the statutory sense" and because, as the Tax Court had found (but not considered to be controlling), the option plan "was designed to achieve more profitable operations" by increasing, through their stock ownership, the employees' incentives (p. 246). That is, the options were not gifts simply because the reason for giving them was the anticipated benefit to the business rather than a gift motive such as "detached and disinterested generosity." And, since the options given LoBue were "prompted by the employer's desire to get better work from him," they were properly classifiable as "compensation for personal service" within the meaning of § 22(a) (p. 247), despite the findings below that they were not "intended" as compensation.

LoBue, we submit, clearly establishes motive as the controlling fact in the characterization of voluntary payments—an approach to the problem which we have tried to show is the only meaningful one. To the extent that the rationale of the Court's earlier decision in *Bogardus v. Commissioner*, 302 U.S. 34, in which the test was phrased as one of the donor's "intent", is inconsistent, it has thus already been dis-

The extent to which the formulation of the issue as one of intent influenced the final decision in *Bogardus* is difficult to tell, for at times the Court, without distinguishing the con-

placed by *LoBue*. All that remains to be done, we believe, is for the Court to clarify that development for the guidance of the lower courts and to discard once and for all the futile search in these cases for "intent".

III

THE REASONS FOR THE TRANSFER HERE REQUIRE ITS CHARACTERIZATION AS COMPENSATION

As we show in our brief in *Kaiser* (pp. 26-30), the opinions of this Court have marked out, at least in general terms, the differences in motivation that distinguish gifts from income. Gifts are payments motivated by "affection, respect, admiration, charity or like impulses" (*Robertson*) or by "detached and disinterested generosity" (*LoBue*). Where, however, the payment is motivated solely by the payor's receipt of commercially-valuable services from the payee, and may thus properly be characterized as given "for services" (*Robertson*) and not "for nothing" (*Commissioner v. Jacobson*, 336 U.S. 28, 49, 50, 51), it is not a gift and must be treated as compen-

cepts, spoke of factors seemingly going to motive rather than intent—e.g., the lack of any moral duty or anticipated benefit (p. 41) and the sense of "spontaneous generosity" by which the stockholders were moved (p. 42). It is fair to say, however, that that formulation obscured the analysis and was responsible for the failure to articulate the difference, if any, between the stockholders' motivation there and the motivation for any other voluntary payment prompted by gratitude for valuable services. While it may be possible to articulate such a difference, we think that, rather than attempt now to rationalize *Bogardus* in new terms, it ought to be recognized simply that it reflected an approach that has since been rejected by this Court and is no longer of value as precedent.

sation. The reasons for the payment here, we will show, clearly bring this case within the latter category.

1. Solely from the business context of the transaction it is clear that the motives for the payment here were of a business, not a personal, nature. That is not a mere inference, however, for the record directly establishes as much. The only evidence going to the reason why respondent was given the automobile was his testimony that Berman had told him that "due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present" (R. 14).^{*} That statement makes clear beyond dispute that the payment was prompted solely by Mohawk's gratitude for the valuable business information supplied by respondent. Respondent's contrary contention that it "was purely out of friendship that the car was given" (Br. in Opp. 24) is simply unsupported by anything in the record. The only evidence remotely relevant—respondent's testimony that he had "known" Berman for seven years (R. 14)—does not establish even that respondent and Berman were more than business acquaintances, much less that it was Berman's affection for him rather than the corporation's business gratitude for respondent's services that prompted the payment. And since the burden of proof was on respondent, we need not even invoke the presumption that, the payment having been made with corporate funds, it was paid for legitimate business reasons and

^{*} Corroborated by respondent's own impression that he would not have been given the automobile had he not given Mohawk the information (R. 15).

not to satisfy a desire of its president to make a gift for personal reasons to a personal friend.⁹

Because "gratitude," standing alone, might involve a variety of different kinds of responses,¹⁰ it is ap-

⁹ That aspect of the problem is more directly involved in *Stanton*, where there was testimony of personal affection, and will be discussed there.

¹⁰ For example, a lavish reward given by a parent to a passer-by who heroically rescued his child can be said to be motivated by "gratitude for services," yet it is evident that it involves a psychological response very different from Mohawk's "gratitude" for the commercially-valuable information given it by respondent. Rather than evoking simply the common sense of fairness that one ought to pay generously for value received, the danger to the child, and the act of rescue strike upon deep-seated emotions of parental love and evoke a sharp emotional response having nothing to do with the commercial "value" of the services.

Another example might be the motivation involved in *Wright v. Commissioner*, 30 T.C. 392. There, Wright, a lawyer, and his personal friend, Fujii (a Japanese newspaper publisher), neither having a pecuniary interest at stake but both believing that the laws were discriminatory and unjust, successfully brought a test suit to have the California alien land laws declared unconstitutional. Thereafter, acting spontaneously, some 1100 persons of Japanese ancestry contributed to a fund out of which, at a dinner held in their honor, Wright and Fujii were each presented with \$10,000 with appropriate commendations. The payment to Wright was held to be a gift rather than "compensation" for his legal services. As the Tax Court pointed out, the economic significance of the decision to most of the contributors was negligible, and it is evident that their response involved primarily emotions of national pride, vindication of their sense of social injustice, and admiration for the socially-motivated efforts of Fujii and Wright.

Although the Tax Court based its decision in *Wright* on the "intent" rationale, we submit that the distinguishing characteristic of cases of that sort is rather that the thing done by the payee acts upon the uniquely "personal" emotions of the payor and not simply upon the payor's sense of obligation to "reciprocate" for value received. In both kinds of cases, it is

propriate to state more precisely the nature of the corporation's "feeling" that, because the information was "so helpful" (i.e., commercially valuable), it "wanted" to make the payment. There is no evidence here that that "feeling" involved anything more than the ordinary desire—almost a sense of "obligation"—of one who has received an economic benefit from another to reciprocate in kind. The motive for the payment, that is, was simply what might be called "ordinary" gratitude for valuable services—a "gratitude" reflecting no more than the accepted ethic that it is "fair" or "right" or "proper" to give value for value, to share financial gains with those who have contributed to them, and to reward loyal service with more than the bare measure of recompense legally due. The motive here, in short, was no different from that that explains such commonplace "gratuities" as tips, employee bonuses, or "presents" to purchasing agents of customer companies.

2. On that analysis of the reasons for the payment, there can be little doubt that the payment here must be characterized as "compensation." If payments not legally due can be compensation—which is the basic premise of all the cases—then a payment motivated by ordinary gratitude for valuable commercial serv-

true, the act done is the *sine qua non* of the payment, but it may be proper to view the intervention of at least some kinds of personal emotions as breaking the causal relationship between the act and the payment and precluding a characterization of the payment as "compensation." Whether such an exception should be made and, if so, what kinds of emotions should be given that effect need not, however, now be decided, for it is evident that no such personal emotions were involved here.

ices performed by the recipient must be compensation virtually by definition, for it is difficult to imagine any motive that provides a more direct causal relationship between the performance of the services and the receipt of the payment. Here, respondent gave Mohawk information at its request, and, when the information proved monetarily valuable, Mohawk out of due gratitude for the economic benefit it had received gave respondent the car. So far as the record appears, no personal emotion of any sort beyond the ordinary sense of gratitude for valuable services intervened in the chain of causation, and the transaction was as much an "exchange" as it is possible to have without an advance expectation of or agreement for payment.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General

CHARLES K. RICE,
Assistant Attorney General

WAYNE G. BARNETT,
Assistant to the Solicitor General

NORMAN H. WOLFE,
Attorney

FEBRUARY 1960.

BRIEF FOR

RESPONDENT

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OFFICE-SUPREME COURT, U.S.

FILED

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JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

October Term, 1959

No. 376

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

v.

MOSE DUBERSTEIN and SYLVIA DUBERSTEIN,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton, Ohio,

Counsel for Respondents.

Of Counsel:

JACOB A. MYERS,
403 Keith Building,
Dayton, Ohio.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 26-29) are not officially reported. The opinion of the court of appeals (R. 30-34) is reported at 265 F. (2d) 28.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1959 (R. 29). On July 7, 1959, by order of Mr. Justice Brennan, the time within which to file a petition for a writ of certiorari was extended to and including September

ber 5, 1959 (R. 35). The petition was filed on September 4, 1959, and granted on December 14, 1959 (R. 35). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

QUESTION PRESENTED

The taxpayer, in 1951, upon request of a business friend of his, gave to the friend whose company did business with the taxpayer's company, some names of possible purchasers of items of merchandise which the business friend's company wanted to sell, which items were not handled by the taxpayer's company. The friend's company did not know what firm or firms handled the items of merchandise which it wanted to try to sell.

Taxpayer gave him the names of several companies who might be interested in purchasing the material, but he did not know, at the time, if any of the companies whose names he gave would want to buy any of the items inquired about. Taxpayer did not contact any of these firms for or on behalf of the business friend. Eventually the business friend of the taxpayer did some business with one or more of the firms or companies whose names were suggested by the taxpayer as possible purchasers of the product. The taxpayer does not know which, if any, of these firms or companies purchased the business friend's products or for how much. The business friend having sold merchandise, and made a profit, insisted upon taxpayer accepting an automobile as a gift, which taxpayer reluctantly accepted because he already had two automobiles, and did not need a third one.

When the business friend found out from his company's auditor that the company would have to pay a tax on the automobile, he wanted to know from his company's auditor how it could avoid paying a tax and was told it could do so by charging the gift of the automobile off as a finder's fee.

This was done (*it was purely an afterthought*). In 1954, the taxpayer learned for the first time that the cost of the automobile had been deducted as a business expense by the donor, and the Government taxed the taxpayer for the value of the automobile.

The question is, under these circumstances, whether the car was income to the taxpayer or a "gift" excludible under § 22 (b) (3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.):

Sec. 22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . . .

(b) Exclusions from Gross Income.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

.

(3) Gifts, bequests, and devises.—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

.

STATEMENT

Duberstein Iron and Metal Company is a corporation located in Dayton, Ohio. Mohawk Metal Company is a cor-

poration with its principal office in New York. Mose Duberstein, President of Duberstein Iron and Metal Company and Morris Berman, President of Mohawk Metal Company were personal friends. The corporations did business with each other over a period of years. Sometime in 1951 Berman called Duberstein and said that his company had some chemical and plastic products and wanted to know whether Mose Duberstein had any idea as to concerns who handle this type of products. Mose Duberstein gave him the names of some concerns that he thought might be interested in those kinds of products. This was done purely as a matter of friendship. Duberstein expected no monetary reward for telling his friend, Berman, the names of these concerns. Duberstein did not contact these concerns and Berman, at the time, evidently had no idea that he was beholden to Mose Duberstein for suggesting these names. Later on that year, Berman called Duberstein and informed him that he wanted to give Duberstein an automobile. Duberstein stated that he didn't want an automobile because he had two and besides, Berman or his company owed him absolutely nothing because he had done nothing for them except as a friend he gave the name of some firms who might be interested in the products Berman was asking about. However, Berman insisted that Duberstein take the automobile, which he did, and that is the last he, Duberstein, heard of the matter until in 1954, when an examiner for the Internal Revenue Department told Duberstein that he had to pay a tax on the automobile, the fair value of which the agent said was \$4,250.00, which tax Duberstein refused to pay, and the matter finally went to the Tax Court by reason of a suit filed by the Taxpayers.

The Tax Court found that the car was income to Mr. Duberstein in the amount of \$4,250.00 in the year 1951, and found the Petitioner liable for income tax thereon in the amount of \$2,570.48 for the year 1951.

The United States Court of Appeals for the Sixth Circuit reversed the Tax Court, and held that the car was a gift.

SUMMARY OF ARGUMENT

I. Intent vs. Motive. Is this Court going to follow the intent of Congress and the Internal Revenue Code of 1939 which excludes gifts from gross income, or is it going to rewrite this section of the code by changing the definition of a "gift" and thereby encroach upon the powers of Congress (Art. I, Sec. I, U. S. Constitution)? A change in the definition of a word is a change in the word itself. If motive became the test for a gift, rather than intent, then there would no longer be an exclusion for a "gift" from gross income, but rather for something else. Any changes in exclusion from gross income in the Internal Revenue Code must be made by Congress and not indirectly by this Court by changing the definition of a word.

II. If motive were to become the test for a gift exclusion from gross income, what motives would be within the class of acceptable ones and which ones would be without the class? Revenue agents are not hired to be psychologists or psychiatrists, or possibly even phrenologists, but they may have to be in order to determine a person's motive.

The real problem comes with the greatest number of cases, meaning thereby from those who have mixed motives in giving a gift. A donor gives a gift to an employee's son—under the proposed motive test, will this be a tax free gift or not? Was the gift given because of the employment relationship or was it given because the donor just wanted to "give something for nothing." Who can tell a person what his motive was for making a gift?

Congress has given us the definition of a gift in the gift tax section of the code, and there is no reason why it should not do the same in the gift exclusion section from gross

income. If the Commissioner desires to change the law, he should go to the Congress and not to the courts.

I. Whether a Payment Is a "Gift" for Federal Income Tax Purposes Depends upon the Intent of the Donor.

When Congress used the word "gift" in Section 22 (b) (3) of the Internal Revenue Code of 1939, it had a well settled judicial meaning, uniform for over a hundred years; in fact this section was enacted in 1913 and has been re-enacted fifteen times without change to date. Congress is presumed to have used it in this settled judicial meaning. *United States v. Merriam*, 263 U. S. 179.

In taxing statutes, the literal meaning of words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. *United States v. Merriam* and *United States v. Anderson*, (1923) 263 U. S. 179, affirming *Id. C. C. A.*, 2nd, 1923; 282 Fed. 851. The judicial definition of "gift" is the same as that given by Blackstone and Kent and the dictionary. It is:

"A voluntary transfer of property by one to another, without any consideration or compensation therefor."

In using the word "gift" Congress meant to employ it in the ordinary and well settled meaning of the term. *Woolford Realty Co. v. Rose*, 286 U. S. 319, 327; *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552, 560. And where a word has an established judicial meaning, as "gift" has, Congress is presumed to have used it, in that meaning.

The same section of the Statute, which excludes gifts from income, also excludes legacies from income.

In *United States v. Merriam*, 263 U. S. 179, the court stated at page 187:

"The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress." *Kepner v. United States*, 195 U. S. 100, 124; *The Abbotsford*, 98 U. S. 440.

The same reasoning applies to the word "gift" since both it and "bequest" were included in the same section of the Code at the same time, and they both refer to exclusions from income.

In order that a gift may be made, there must be a donative intent on the part of the donor, a transfer of the property, and receipt of the property by the donee. If one of these elements is lacking, then there is no gift, but rather a trust, a loan, a payment, or a bailment.

The Commissioner is contending that even if all the Common Law elements of a gift are present, there cannot be a gift if the donor has the wrong kind of motive.

This Court is called upon to determine the way Congress intended the word "gift" to be interpreted, and in doing so, the elements therein contained. One insight will be gotten from a Ways and Means Committee of the House of Representatives Report. This particular Committee was discussing the word "gift" as used in the gift tax, but the content is still valuable in this particular context.

"The tax applies only to gifts made by individuals, and so far as the calendar year 1932 is concerned, applies only to gifts made after the enactment of the Act (section 532 [a]).

The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.

The words 'transfer . . . by gift' and 'whether . . . direct or indirect' are designed to cover and comprehend all transactions (subject to certain express conditions and limitations) whereby, and to the extent

(section 503) that, property or a property right is *donatively passed* (emphasis ours) to or conferred upon another, regardless of the means or the device employed in its accomplishment. For example, (1) a transfer of property by a corporation without a consideration, or one less than adequate and full in money or money's worth, to B would constitute a gift from the stockholders of the corporation to B; (2) a transfer by A to a corporation owned by his children would constitute a gift to the children; . . . (H. Rep. No. 708, 72d Cong., 1st Sess. CB 1939-1 Part 2, 457, 476.)

Congress was then only concerned with donative intent and not with the motive behind the intent.

It is clear that the true intention of the parties should control in determining whether the payment involved is in fact a gift or compensation. A donative intent is an essential requirement of a gift. Bogardus v. Commissioner, 302 U. S. 34; Helvering v. National Grocery Co., 304 U. S. 282; Botchford v. Commissioner, 9 Cir., 81 F. (2d) 914; Mulqueen v. Commissioner, 2 Cir., 65 F. (2d) 365. If the payor's intent is not shown, the recipient's belief or his treatment of the payment is immaterial. Arthur L. Lougee, 26 B. T. A. 23, affd. 63 F. (2d) 112 (C. C. A. 1st, 1933).

A legal obligation of the payor is not necessary to constitute the payment as income to the recipient, but this rule has only been applied where (1) there was an employment relationship between the donor and the donee, or (2) where there was no intent to make a gift. [*Old Colony Trust Co. v. Commissioner, supra; Edward F. Webber, 21 T. C. 742 (1954), affd. 219 F. (2d) 834 (C. C. A. 10th, 1955).*]

In *Edward F. Webber, supra*, the taxpayer was a preacher who preached and solicited contributions from listeners over the radio. The court held, "The determination of the taxable nature of monies received depends largely upon the real intent of the parties, particularly the

payor, as disclosed by the particular facts and circumstances surrounding the questioned payments. *Bogardus v. Commissioner*, 302 U. S. 34; *Helvering v. National Grocery Co.*, 304 U. S. 282, 289; *Commissioner v. Jacobson*, 336 U. S. 28; *Fisher v. Commissioner*, 2 Cir., 59 F. 2d 192; *Bass v. Hawley*, 5 Cir., 62 F. 2d 721; *Willkie v. Commissioner*, 6 Cir., 127 F. 2d 953; *Thomas v. Commissioner*, 5 Cir., 35 F. 2d 378; *Smith v. Manning*, 3 Cir., 189 F. 2d 345. In absence of an expressed donative intent of the payor, the tax court may draw reasonable basis for its conclusion that the payments were compensatory rather than donative, we have no alternative but to affirm its decision, *Botchford v. Commissioner*, 9 Cir., 81 F. 2d 914, *Poorman v. Commissioner*, 9 Cir., 131 F. 2d 946."

This case falls into the pattern of cases which require that donative intent be shown by the taxpayer before there can be a gift. An exception to this rule is found in the case of *Helvering v. American Dental Company*, 318 U. S. 322, where no donative intent was shown and still a gift was found to have been made.

In the *Old Colony Trust Company v. Commissioner*, 279 U. S. 716, the Board of Directors of the corporation by which the taxpayer was employed, voted to pay the taxes on the taxpayer's salary as a "gift" to him. The Court stated, "The taxes were paid upon a valuable consideration, namely, the services rendered by the employee and as part of the compensation therefor. We think therefore, that the payment constituted income to the employee."

In the above case (*Old Colony Trust Co. v. Commissioner*) there was no gift, even though there was a donative intent shown, because there was an overriding factor, that factor being that there was an employment relationship which created almost an irrebutable presumption of compensation rather than gift. *Willkie v. Commissioner*, 127 F. (2d) 953 (C. C. A. 6th, 1942); *Poorman v. Commis-*

sioner, 131 F. (2d) 946 (C. C. A. 9th, 1942); *Carragan v. Commissioner*, 197 F. (2d) 246 (C. A. 2d, 1952); *Nickelsburg v. Commissioner*, 154 F. (2d) 70 (C. C. A. 2d, 1946); *Wallace v. Commissioner*, 219 F. (2d) 855 (C. A. 5th, 1955); *Commissioner v. LoBue*, 351 U. S. 243.

There is no such presumption in the case at bar, as there was neither an employer-employee relationship nor any type of commission arrangement between Duberstein, as donee, and Berman, as donor of the gift. The relationship between these parties was purely a friendly one, which had grown up over the years from doing business together. This was not a payment as the one made in *LoBue*, *supra*, which was "prompted by the employer's desire to get better work from him."

In *Commissioner v. LoBue*, *supra*, the donee was given stock options in recognition of his "contribution and efforts in making the operation of the company successful." This Court held that this was not a gift but clearly compensation for services rendered, since this is what the resolution of the donor stated.

If the test is properly one of intent and if the determination of that question is one of fact, the decision of the Court of Appeals involving this issue should not be disturbed by this Court. The reason for the reversal of the Tax Court by the Court of Appeals in *Duberstein v. Commissioner*, was because the weight of the evidence presented in the Tax Court was in favor of the taxpayer and not in favor of the Commissioner, as the Tax Court so held.

The evidence presented in the Tax Court clearly showed that there was an intent to give the car to Duberstein as a gift. Mr. Duberstein's uncontradicted testimony stated in part:

"... And he said, well, he had a cadillac car as a gift, and I should send to New York to receive it, which I finally did." (R. 14)

This statement shows that Berman clearly intended that Duberstein receive the automobile as a gift, *which fact the Commissioner has conceded.*

The cases which have been decided concerning the question of "What is a gift" can be reconciled, and the case at bar will stand under this reconciliation as a case of a gift and not one of compensation. In *Bogardus v. Commissioner*, 302 U. S. 34, a "bouns" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only \$4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus required." "Unopco" made a general distribution as a "gift" or "honorarium" of \$6,000,000 to all the former employees of "Universal," of which the plaintiff's share was \$10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal."

The Supreme Court of the United States held that the payments made to the employees of Universal were gifts and not compensation. This Court stated, "Whether the receipts are gifts, is primarily a question of fact to be resolved upon the circumstances of the cases." *Bogardus v. Commissioner, supra; Commissioner v. Jacobson*, 336 U. S. 28.

In *Bogardus v. Commissioner, supra*, the facts showed: (1) a clear donative intent, (2) the employees who received the gifts were no longer employees of the donor, (3) any services which were previously performed were fully compensated for.

Duberstein a present. He stated that he had a Cadillac car for Duberstein and requested him to come to New York to receive it as a gift. At that time, Duberstein advised Berman that he did not feel Berman or the company owed him anything, that he had not expected anything for the information given to Berman, and had not intended to be compensated. He testified that Berman insisted he accept the Cadillac car. Duberstein did so. No further conversations were had between Duberstein and Berman, after receipt of the car, concerning the question of whether it was a gift or was taxable compensation. It was undisputed that Duberstein was not an employee of the Mohawk Metal Corporation and that there was no understanding or agreement between him and Mohawk Metal Corporation that he was to be compensated in any way for information given Berman.

In 1954, an agent of the Internal Revenue Department got in touch with Duberstein and stated his intention to charge Duberstein with receipt of income in 1951 in the amount of the fair market value of the Cadillac. Duberstein referred the matter to his accountant, one Flagel, who then learned that Mohawk Metal Corporation had deducted as expense the value of the Cadillac car on its tax return for 1951, classifying the item as a "finder's fee" paid to Duberstein. Mr. Flagel wrote several letters to Berman concerning the matter, but got no response. He then contacted one Gorin, the accountant who prepared the income tax return for Mohawk Metal Corporation. Evidence was received by the Tax Court that when Gorin, Mohawk's accountant, prepared the 1951 tax return for the corporation, he discussed the matter of this Cadillac automobile with Berman. He gave Flagel the following account of his talk with Berman:

"Well, he had talked with Mr. Berman and explained to Mr. Berman that if the Cadillac was recorded as a gift, it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The Tax Court concluded as follows:

"Upon this record, we conclude that petitioners have failed to carry the burden of proving that the automobile was a gift. The only justifiable inference is that the automobile was intended by the payor to be remuneration for services rendered to it by Duberstein."

It bottomed its decision primarily upon its finding that, "the record is significantly barren of evidence revealing any intention on the part of the payor to make a gift."

We believe that the taxpayer met his burden of proof and that any presumption in favor of the correctness of the Commissioner's assessment disappeared when met by uncontradicted evidence that the Cadillac automobile was a gift. The Tax Court was of the opinion that there was no evidence introduced by taxpayer as to the donor's donative intent. In this, we think the Tax Court disregarded the effect of the uncontradicted testimony. It was not necessary to bring in the donor, himself, to prove his donative intent. The taxpayer's uncontradicted evidence gave an account of what was said and done at the time the event occurred. The intent that then prevailed should control the character of the transfer. Duberstein testified as follows:

"He (Mr. Berman) told me that due to the fact that I—information that I had given him was so helpful, that he felt that he wanted to give me a present. I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did. But I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated, but he insisted and I accepted this Cadillac car."

The foregoing is clear and distinct evidence of the donative intent of Berman at the time that arrange-

ments were made to deliver the Cadillac car. This evidence was not impeached, and we think the Tax Court was in error in its assertion that the record was barren of any proof of donative intent. The Tax Court inferred lack of donative intent on the part of Berman because his corporation took the value of the car as a business expense, classifying it as a "finder's fee." If, in fact, there was donative intent at the time of the event involved, a subsequent change of mind by the donor at income tax time, cannot change the character of what was, in fact, a gift at the time it was made. The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

"He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible."

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a "finder's fee" and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein.

The appropriate rule has been stated by this Court in an Opinion by Judge Denison in the case of *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 45 F. (2d) 43 (45):

"We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the Commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we think, the duty of the board to take the same view."

In the case of *Lunsford v. Commissioner of Internal Revenue*, 62 F. (2d) 740 (742), this Court reaffirmed this principle in a case very much in point with the case at bar. There the question was whether or not a payment was a gift or compensation. Speaking for this Court, Judge Simons said:

"We have repeatedly held that the taxpayer has made out his case when he has put in proofs 'clearly and distinctly tending to show' a determining fact. . . . The presumption that the Commissioner is right is procedural and cannot survive such proofs unless they are challenged by contrary proofs, or destructive analysis, and we have gone so far as to say that the taxpayer's affirmative evidence may itself contain the necessary challenge and furnish the material for such analysis."

We find that the taxpayer's evidence clearly and distinctly offered proof that the Cadillac car was, in fact, a gift. It was not challenged by contrary proofs or destructive analysis.

It may be contended that in such a case as this we should add suspicion to presumption of correctness to aid the Commissioner's assessment of a deficiency. This we can not do. These matters should be decided on evidence. In the case of *Lunsford v. Commissioner*, supra, Judge Simons characterized such attitude as follows:

"At most, the Board's finding rests upon mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from that fact alone be suspected."

We hold that the taxpayer met his burden of proof that the Cadillac was a gift, and the decision of the Tax Court is, accordingly, reversed.

MARTIN, Chief Judge, dissenting. As I view this case, there was ample circumstantial evidence to sup-

port the Commissioner of Internal Revenue and the Tax Court in finding that the appellant received the Cadillac automobile, not as a gift, but for the valuable consideration of services rendered. I am, therefore, unable to concur in the majority opinion.

The United States Court of Appeals for the Sixth Circuit in its opinion, showed ample reason for its decision. On the question of whether or not the deduction by the donor was either an after-thought or a change of mind, we respectfully call this Court's attention to the words in the opinion of the United States Court of Appeals for the Sixth Circuit, as follows:

"The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

" 'He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible.'

"The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a 'finder's fee' and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein." (Emphasis ours.)

The taxpayer never received a Form 1099 and Mohawk's accountant stated that he had receipts for every 1099 he sent out but he did not have a receipt showing he sent one to Duberstein.

In *Whitney v. Commissioner* (C. A. 3rd, 1934), 73 F. (2d) 589, the Court states that once the taxpayer meets the

burden of proof "The burden shifted and the government was required to come forward with evidence to refute the evidence of the taxpayer. It did not do so and the Board cannot draw inferences and conclusions from facts or suppositions outside the record."

In *Crude Oil Corp. of America v. Commissioner* (C. A. 10th, 1947), 161 F. (2d) 809, it was held "*The presumption of the correctness of the Commissioner's finding is one of law. It is not an inference of fact. It disappears when evidence, sufficient to sustain a contrary finding, has been introduced.*" (Emphasis ours.)

The cases of *Gillette's Estate v. Commissioner* (C. A. 9th, 1950), 182 F. (2d) 1010, and *Hemphill Schools, Inc. v. Commissioner* (C. A. 9th, 1943), 137 F. (2d) 961, held that the presumption that the determination of the Collector of Internal Revenue is correct does not serve as evidence.

In the case of *A & A Tool and Supply Co. v. Commissioner* (C. A. 10th, 1950), 182 F. (2d) 300, it was held that the Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. In that case it was held that the taxpayer's opinion as owner as to the rental value of real estate which was in evidence was sufficient to overcome the presumption of the correctness of the determination of the Collector of Internal Revenue with respect to the same question, there being no other evidence on the point in the record.

The law with respect to the effect of the Commissioner's determination is set forth in the case of Joseph Starr at page 293, Tax Court Memorandum Decisions, Vol. 13 as follows: "The rule as to the burden of proof upon the petitioner is generally stated to be that the taxpayer having the burden of proof must prove his facts by a 'preponderance of the evidence' and by competent evidence." . . . The Commissioner's determination is prima facie correct. Of

course, that presumption does not amount to substantive evidence."

In *Wichita Terminal Elevator Co.*, 1946, 6 T. C. 1158, Aff'd (C. C. A. 10th, 1947), 162 F. (2d) 513, 35 A. F. T. R. 1487, the taxpayer relied only on the formal documents of sale and did not appear personally to testify with respect to when a sale of corporate assets was negotiated. There was no other testimony and the Court in effect relied on the "one-step" rule in deciding against the taxpayer. The Court said at page 1165, Vol. 6 Tax Court Reports, "The rule is well established that the failure of a party to introduce evidence *within his possession* (emphasis ours) and which, if true, would be favorable to him, gives rise to the presumption that if produced it would be unfavorable."

As the record demonstrates, there was no contract of employment or arrangement of any kind between Mohawk Metal Corporation and Mr. Duberstein. Mohawk was not obligated to Duberstein in any way and there was no intention to compensate Duberstein in any way at the time the gift of the car was made. It was purely out of friendship that the car was given to Duberstein. Duberstein rendered no service to Mohawk and his services were not solicited by Mohawk Corporation. It was purely and simply a matter of friendship that he discussed Mr. Berman's problems with him.

In view of Mr. Duberstein's testimony, which was not contradicted, it was clearly erroneous for the Tax Court to find that the car constituted income to Mr. Duberstein.

The case of *Alice M. MacFarlane v. Commissioner*, 19 T. C. 9, held a payment made by a corporation to be a tax free gift to the recipient despite the fact that the payment was deducted by the corporation.

In *John McKeon*, 39 BTA 813, a payment of \$20,000.00 which was deducted by the donor made to the taxpayer for

his services in assisting in the sale of certain securities was held to be a non-taxable gift to the recipient, since there was no agreement for compensation, or legal liability to pay. This case differs in no substantial particular from the case at bar. There are the similarities of no existing agreement for compensation and no legal liability to pay, plus the additional reluctance and initial refusal of the donee to accept the gift, followed by the later acceptance of the gift, at the insistence of the donor.

We call attention to the case of *Lunsford v. Commissioner* (C. C. A. 6, 1933) 62 Fed. (2d) 740, which holds a \$50,000.00 gift non-taxable where there was no employer-employee relationship, and in which there was no evidence of shareholder approval of the gift in the record. The Circuit Court says, in reversing the Tax Board, "At most, the Board's finding rests on mere suspicion, upon an inference that generosity of the kind here involved is so rare that it must necessarily from the fact alone be suspected."

We respectfully submit that the decision of the Tax Court in this case was based on an analogous type of suspicion, and not from testimony in the record.

The United States Court of Appeals for the Sixth Circuit had every legal right to reverse the Tax Court. The reasons given by the distinguished Solicitor General of the United States for granting the Writ as not tenable here, because the case at bar and the cases cited are easily distinguishable. We do not feel that any argument is necessary to distinguish them because they speak for themselves. There was no relationship in the case at bar with the taxpayer as employer, employee, stockholder or otherwise, and this fact distinguishes the cited cases from the case at bar.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton 2, Ohio,
Attorney for Appellants.

October, 1959

BRIEF
FOR
PETITIONER

FILE COPY

Office Supreme Court, U.S.

FILED

FEB 12 1960

JAMES E. BROWNING, Clerk

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1959

COMMISSIONERS OF INTERNAL REVENUE, PETITIONERS

v.

MOSE DUBERSTEIN AND SYLVIA DUBERSTEIN

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE PETITIONER

J. LEE HANKIN,

Solicitor General,

CHARLES E. RICE,

Assistant Attorney General,

WAYNE G. BARNETT,

Assistant to the Solicitor General,

NORMAN M. WOLFE,

Attorney,

Department of Justice, Washington 25, D.C.

The distinction between the *Old Colony Trust Company* case, *supra*, and the *Bogardus* case, *supra*, is that in both cases there was the intention to make a gift on the part of the donor but in the *Old Colony Trust Company* case, the services being rendered were by an employee, and were found to be a consideration, in that the employee was *still* an employee and this gift was merely an attempt by the employer to increase his salary, tax free.

In *Estate of Grace G. McAdow*, 12 T. C. 211 (1949), the son and daughter of the taxpayer's former employer transferred to the taxpayer securities of substantial value, describing the transfer as a gift and filing gift tax returns. The taxpayer had been fully compensated for his employment, and services which he had rendered to the son and daughter were mainly incidental to his employment by the father. The motive of the gift was recited by the son and daughter to be "for an old and true friendship of over 20 years." Under these circumstances it was held that the transfer was a gift, and not compensation for additional services. The Commissioner of Internal Revenue acquiesced to this determination.

The same reasoning was used in *Smith v. Manning*, 189 F. (2d) 345 (C. A. 3d, 1951), with the result again turning on "intent." In this case the taxpayers were employed by their father. The Internal Revenue Department disallowed part of the salaries paid to the children as business expenses because they were excessive. The taxpayers then brought suit for a refund of the tax paid on the disallowed portion of their salaries claiming that they were gifts. The Court held for the government, because even though the payments were not deductible as compensation, because they were excessive, they were also not gifts because there was no donative intent shown. The court here used mutually exclusive tests for "compensation" and "gifts."

In all the aforementioned cases, the basic factor necessary to find a gift was that there be an intent to make a gift. The reasons the donor might have had for giving the gift were more or less irrelevant.

The only exception to this rule has been where the donor has also been the employer of the donee. In these cases the courts have held that the intent to give a gift was merely an ostensible intent and that actually the gift was a further payment for services performed or to be performed by the donee.

The leading cases on this point are the *Old Colony Trust Company* case, *supra*, and the *LoBue* case, *supra*. This rule applies to the type of situation where a Christmas gift, a production bonus, or some other type of gift is given to an employee. Because of the tie-in of extra payments to employees by employers, to their regular work and salary, there is a presumption of compensation where such "gifts" are given. To merely show, in these cases, where there is an employment relationship, that the donor "intended" to give a gift is not enough, because this alone will not rebut the presumption of compensation which exists because of the employment relationship. The Courts in these cases have demanded that there be a showing, where such an employment relationship exists, that the gift was not for further payment of services rendered, but rather for some other reason which is apart and detached from this employment relationship. This is why the court in *LoBue*, *supra*, demanded a "detached and disinterested generosity" for giving the gift before it would find that a gift had been made. It had to be sure that the gift was a gift and not further compensation. There is no such presumption existing except where the donor is also the employer, and the donee, the employee. Where there is no employment relationship, a showing of "intent" alone is sufficient to sustain the holding of a "gift."

II. Motive Cannot Be Used to Determine If a Gift Has Been Made for Federal Income Tax Purposes.

The Commissioner's argument that "motive" rather than "intent" should be used to determine if a gift has been made is an attempt by him to have this Court assume a legislative function. The reason he wants "motive" to be used as the test, is because he desires to have a loophole closed which exists in the law, but this closing is a proper legislative and not a judicial function. The loophole is that certain gifts are proper business expenses to the donor and are deductible as such, and they are also excludable from income by the donees as gifts. The government is losing tax dollars on transactions such as these and wishes this Court to legislate in the field, by saying that the definition of gifts for donor and the donee are the same.

An example of such a situation would be where A is a retailer and B is a salesman who has never sold to A, but desires to have his business. In order to lay a foundation for his approach of A for his business, B gives to A, a set of golf clubs as a gift. B then approaches A, but is refused his business. B may deduct these golf clubs as a business expense, probably for good will or advertising. A on the other hand has a pure and simple gift as the law now reads. There was a donative intent on the part of B and A has had no connection with B, except that B has solicited his business. B has performed no services for A, nor is he employed by him.

If the motive approach were used as the Commissioner has proposed, B would have a deduction as an expense as he did before, but A would have to pay a tax on the gift because B's motive in giving the gift was to increase his business. For the sake of argument, this is assuming that there cannot be a business motive and have a valid gift, *infra*. This would mean that if the donor would use the "gift" as a deduction, then the donee could not receive the

item as a "gift," but rather it would have to be compensation. He would be bound by the donor's treatment of the item, either as an item of expense or as a gift.

The flaw in the government's argument is that the converse situation will not follow the rule which it has proposed. In this situation, A may perform some service to B. B will pay A for the service which was performed, but B's payment to A is held to be a gift under the gift tax law because he has not received an adequate and full consideration in money or money's worth under the test provided in the gift tax section. Since A has performed the service and been paid for it, the payment which he received is taxable as income. Here the payor had a business motive and he has still been held to have made a gift.

A, who has received the payment, cannot claim that he has received a gift because the donor-payor is held to have made a gift. The treatment of the item by B does not govern the treatment of the item by A, but the Commissioner desires this result when the payor uses the item as an expense item.

In the famous *Pot of Gold* case [Pauline C. Washburn, 5 T. C. 1333 (1945); *Accord: Bates v. Glenn*, 114 F. Supp. 445 (W. D. Va. 1953), *affd.*, 217 F. (2d) 535 (6th Cir. 1954), § 74, 1954 Code], it was held that a prize given away on a radio show was a gift as far as the recipient of the prize was concerned and was not taxable to her as income, since she performed no services and gave no other consideration for the award. It would seem fairly obvious, however, that the sponsor of the program did not make a taxable gift to the prize winner, since from the sponsor's point of view of this was a business expense, i.e., part of the cost of the radio program. Under the 1954 Code commercial prizes and awards, like the *Pot of Gold*, are now taxable as income [§ 74, 1954 Code. Cf. *Christian H. Droge*, 35 B. T. A. 829 (1937); *Max Silver*, 42 B. T. A. 461 (1940); I. T. 1651, II-1

C. B. 54 (1923); T. 1667, H-1 C. B. 83 (1923); I. T. 3987, 1950-1, C. B. 9].

Congress realizing there was a loophole in the law, closed it with new section 74 of the Internal Revenue Code. By its action, Congress has shown that remedying this type of a situation is a legislative function and not a judicial one. The Pot of Gold situation is almost identical to the one at bar. If Congress desired to have a "gift" turn on the motive of the donor, it would have amended this section of the Code, the same as it enacted section 74 of the Code.

The determination of a donor's motive in most instances, would be much more difficult to determine than his intent. The courts have required an outward manifestation of intent, but in what way can a person show his motive? Must he say "I have intent to give a gift, and this is the reason I have such an intent?" There is no where shown that Congress intended that gifts could be given only for certain reasons and not for others. For example, if one man hated another so much that he decided to give him \$100,000, knowing that he would drink himself to death, there would nevertheless be a gift. There was an intent to make a gift and the motive would be one of hate. The same \$100,000 gift could be made by one friend to another and the motive would be for love or friendship.

In each of these two situations a gift was made. In the first case the motive was hate, and in the second, it was for love and/or friendship.

The Commissioner is contending that a gift may be given only for "affection, respect, admiration, charity, or like impulses" (*Robertson v. United States*, 343 U. S. 711, 713-714) or for "detached and disinterested generosity" (*Commissioner v. LoBue*, 351 U. S. 243). In *Commissioner v. Jacobson*, 336 U. S. 28 at page 50 there is a more logical and meaningful definition of a gift when it states, "It is conceivable, although hardly likely, that a bondholder, in

the ordinary course of business and without any express release of his debtor; might have sold part of his claims on the bonds he held at the full face value of those parts and then have made a gift of the rest of his claims on those bonds to the same debtor *for nothing*" (emphasis ours).

This test more adequately describes the cases which have been decided by this and the lower courts on the question of "has a 'gift' been made?" A gift is a transfer of something of value "for nothing." This means that it is irrelevant what the reasons may be for giving the gift; they may be for business [*Old Colony Trust Company v. Commissioner, supra; Bounds v. United States*, 262 F. (2d) 876 (C. A. 4th, 1958)], as well as for any other reason and therefore not fit under the *Robertson* or the *LoBue* definitions, but rather under the *Jacobson* definition of a gift.

In *Bounds v. United States, supra*, the court very adequately summed up the relationship which exists between a donor and a donee when it said, "Rarely is a gift bestowed upon a complete stranger who has never had even an indirect relation to the donor or to someone related to the donor." In all of these "widow's bonus" cases, the relationship between the widows and the donor-corporation was one created through a business relationship of their husbands with the corporation. The payments to the widows were held to be gifts because there was a transfer "of something (the bonus) for nothing." It makes no difference why the gift was given as long as it was given for nothing.

The Treasury ruled at one time that payments by an employer to the widow of a deceased employee could be deducted by the employer as business expenses, although they were treated as a gift as far as the widow was concerned. [I. T. 3329, 1939-2, C. B. 153. Revoked in I. T. 4027, 1950-2 C. B. 9. Cf. § 101 (b), 1954 Code; *Bausch v. Commr.*, 186 F. (2d) 313 (C. A. 2d, 1951).]

The case at bar is also a transfer of something for nothing and it is irrelevant that there was a business relationship between the parties and that there might have been a business motive for making the gift. This reason only affects the donor. The uncontradicted testimony of Duberstein shows that there was an intent to make a gift, which fact as above stated, the Commissioner has conceded.

Duberstein testified as follows:

"He (Morris Berman) told me that due to the fact that I—the information that I had given him was so helpful, that he felt that he wanted to give me a present. And I told him he didn't owe me anything. And he said, well, he had a Cadillac car as a gift, and I should send to New York to receive it, which I finally did, but I told him he owed me nothing, and I didn't expect anything for the information, and I didn't intend to be compensated but he insisted that I accept this Cadillac car." (R. 14)

Duberstein and Mohawk (Berman) dealt in buying and selling copper and various other metals (R. 13). The testimony then stated:

"Q. Now, state whether or not it is a fact that occasionally when you talked to him he would ask you questions about the names of consumers who used certain chemicals, and that if you knew the names of such consumers you'd give them to him? A. That's right. I did.

Q. What were the type of materials, or chemicals that he asked you about? A. Oh, one was plexiglas, and another was polyethylene, nickel salts." (R. 14)

Duberstein was asked by Berman if he knew who were consumers of certain chemicals which Berman desired to sell and which chemicals Duberstein did not deal in. Duberstein was not asked if he knew who would purchase the chemicals, but rather if he knew who were consumers of the

chemicals, or in other words, companies which might be interested in purchasing these chemicals. Duberstein then gave to Berman the names of companies which might be interested, and not names of companies which would be interested in making such purchases.

The Commissioner is contending that Berman (Mohawk) gave the gift to Duberstein because Duberstein had given him commercially valuable information. There is great doubt as to the value of the information which was given, although concededly everything is of some value to someone. There is a great distinction between telling who *will* purchase the products and who *might possibly* be interested in purchasing the product. Duberstein in no way performed any service, as the Government claims, but instead he gave to Berman some information so that Berman might be able to perform the service; that service being, the finding of a buyer for Berman's products. If, on the other hand, Duberstein had himself made inquiries as to who would be interested in purchasing the materials, which Berman had to sell, Duberstein would have performed a service and any payment made to him would have been in the form of compensation. Duberstein did not give to Berman the name of a person who would purchase Berman's products, but rather gave to him the names of individuals who might possibly be interested in purchasing his products.

Mohawk (Berman) gave to Duberstein a Cadillac worth \$4,250.00 (R. 8) because he was grateful to Duberstein for having told him who *might* be interested in purchasing his products. What was the value of this information, if it had any? Duberstein could have been reading the names of concerns out of a trade journal. The Court of Appeals opinion describes Berman's "motive" well when it states,

"The evidence received as to the conversation between the accountants for Duberstein and for Mohawk Metal Corporation clearly indicates that treating what

had been a gift as a business deduction was either an afterthought or a change of mind on the part of Berman.

'He . . . explained to Mr. Berman that if the Cadillac was recorded as a gift it would not be deductible as such. Mr. Berman wanted to know how it would be deductible.'

The foregoing strongly indicates that even at the time of the discussion with his accountant, Mr. Berman was talking about this Cadillac as a gift. The fact that a decision may then have been made to label it as a 'finder's fee' and claim it as a deduction, does not change the original character of the transaction. The Government offered no evidence to contradict Duberstein." (R. 34 & 35)

Berman wanted to deduct this "gift" as an expense, so he labeled it as a "finder's fee." Duberstein found nothing but rather Berman did all the finding in this case. The answer is that Berman was grateful; whether he had anything to be grateful about or not, the Commissioner does not seem to be concerned with at this time. The only claim is that an automobile was given because of gratitude. There was no payment for services rendered here because there was no service involved, but still there was gratitude.

The Commissioner therefore is contending that Berman could have been grateful to anyone except a business friend and he could have given anyone else a Cadillac as a gift. The same kind of "gratitude" is no good when the gift is deducted as a business expense by the donor. The Commissioner's view on this point is rather one sided.

If this automobile had been checked closer as a deduction on Mohawk's tax return, it most likely would not have been allowed in the first instance. There was no consideration which passed for the car and therefore it should have been treated as a gift. Since the Commissioner has let the stat-

ute of limitations run against Mohawk, the only one from whom it can recoup its loss is Duberstein.

The distinction as to who may be grateful and for what reasons is too fine of a distinction for anyone to comprehend and enforce. If one person for gratitude may give a gift, then another for the same feeling of gratitude must be able to give a gift. In order to be grateful, there must have been something done by someone. This is inherent in the word "gratitude." The same feeling (gratitude) may elicit different or similar responses from different people, for the same act performed. Are we going to say that dependent upon the response and the *motive behind the motive of gratitude* of the donor, we will try to determine if there has been a valid gift or not? Not even Congress would enact a law with such potential complications as this.

It is common knowledge that a great proportion of the gifts given arise out of business relationships. Are we going to call all of these gifts income to the donee because of the fortuity of a business relationship? If this be the rule then consider all the brides who will have a taxable income in the form of gifts from their fathers' business associates; or the little boy who receives a toy gun for Christmas from his father's employer, and has to fill out an income tax form to report this as income. This is not the result which we desire to reach.

To reach the conclusion that gifts cannot be made, except where there is love and affection between the parties would cause this Court to overrule a whole line of cases, where the basis of the relationship between the parties was a business one. *Bogardus v. Commissioner*, 302 U. S. 34; *Helvering v. American Dental Company*, 318 U. S. 22; *Bounds v. United States*, 262 F. (2d) 876 (C. A. 4th, 1958), and all other widow's bonus cases.

Congress has shown its intention for a corporation to be able to give a gift, as is stated in §§ 23 (q) and 101 of the

1939 Code; §§ 170 and 501 of the 1954 Code which provides an exemption for charitable deductions made by corporations.

A corporation, being an artificial being is not capable of feeling, which includes love and affection; this is true even when it makes a charitable gift as provided for in the statute. The only reason which a corporation may have for making such a charitable gift then is for a business reason. Since Congress has provided that a corporation may make a charitable gift, and a corporation can only have business reasons for so acting, *a fortiori*, Congress has shown that a business motive is a valid motive for a corporation making a gift.

Even if Berman did consider the information as commercially valuable, the conclusion is nevertheless the same, it makes no difference what he thought. The manner in which he treats an item is in no way binding upon Duberstein. The donor's and the donee's treatment of an item are mutually exclusive as far as the tax laws are concerned. For practical purposes, one taxpayer has no way of knowing how another treats an item on his tax return.

According to the Ways and Means Committee Report of the House of Representatives, *supra*, Congress in no way intended that if there is a gift by donor there must be a gift to the donee. It is a quite common situation where there is a gift by the donor and taxable income to the donee. The reason for this is because of the definition of "gift" which is included in the gift tax laws.

If Congress intended mutually exclusive definitions of "gifts" in the gift tax law and the gift exclusion from income, there is no reason to believe that Congress did *not* intend that there also be mutually exclusive definitions of "gifts" in the gift exclusion from income, and the use of the item as a deductible expense by the donor.

The motive of one party then can have no binding force and effect on the other party for the above and following reasons: (1) Congressional intent is otherwise; (2) Any changes in the definition of the word gift would actually change the word itself and this would introduce a new exclusion into the code other than "gift," and this can only be done by Congress; (3) The word "motive" is too nebulous for any courts or agency to adjudicate from, and who is to determine which motives are valid and which ones are invalid in order to create a valid gift?

CONCLUSION

Therefore, for the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

SIDNEY G. KUSWORM,
403 Keith Building,
Dayton, Ohio,

Counsel for Respondents.

Of Counsel:

JACOB A. MYERS,
403 Keith Building,
Dayton, Ohio.

SUPREME COURT OF THE UNITED STATES

NOS. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner, 376 v.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
Mose Duberstein, et al.		

Alden D. Stanton, et al., 546 v.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
United States of America.		

[June 13, 1960.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These two cases concern the provision of the Internal Revenue Code which excludes from the gross income of an income taxpayer "the value of property acquired by gift."¹ They pose the frequently recurrent question whether a specific transfer to a taxpayer in fact amounted to a "gift" to him within the meaning of the statute. The importance to decision of the facts of the cases requires that we state them in some detail.

No. 376, *Commissioner v. Duberstein*. The taxpayer, Duberstein,² was president of the Duberstein Iron & Metal Company, a corporation with headquarters in Dayton, Ohio. For some years the taxpayer's company had done business with Mohawk Metal Corporation, whose headquarters were in New York City. The president of Mohawk was one Berman. The taxpayer and

¹ The operative provision in the cases at bar is § 22 (b) (3) of the 1939 Internal Revenue Code. The corresponding provision of the present Code is § 102 (a).

² In both cases the husband will be referred to as the taxpayer although his wife joined with him in joint tax returns.

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Berman had generally used the telephone to transact their companies' business with each other, which consisted of buying and selling metals. The taxpayer testified, without elaboration, that he knew Berman "personally" and had known him for about seven years. From time to time in their telephone conversations, Berman would ask Duberstein whether the latter knew of potential customers for some of Mohawk's products in which Duberstein's company itself was not interested. Duberstein provided the names of potential customers for these items.

One day in 1951 Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give the latter a present. Duberstein stated that Berman owed him nothing. Berman said that he had a Cadillac as a gift for Duberstein, and that the latter should send to New York for it; Berman insisted that Duberstein accept the car, and the latter finally did so, protesting however that he had not intended to be compensated for the information. At the time Duberstein already had a Cadillac and an Oldsmobile, and felt that he did not need another car. Duberstein testified that he did not think Berman would have sent him the Cadillac if he had not furnished him with information about the customers. It appeared that Mohawk later deducted the value of the Cadillac as a business expense on its corporate income tax return.

Duberstein did not include the value of the Cadillac in gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the car's value against him, and in proceedings to review the deficiency the Tax Court affirmed the Commissioner's determination. It said that "The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. . . . The only justifiable inference is that the automobile was intended by the payor to be remuneration

for services rendered to it by Duberstein." The Court of Appeals for the Sixth Circuit reversed. 265 F. 2d 28.

No. 546. *Stanton v. United States*. The taxpayer Stanton had been for approximately 10 years in the employ of Trinity Church in New York City. He was comptroller of the Church corporation, and president of a corporation the church set up as a fully owned subsidiary, Trinity Operating Company, to manage its real estate holdings, which were more extensive than simply the church property. His salary by the end of his employment there in 1942 amounted to \$22,500 a year. Effective November 30, 1942, he resigned from both positions to go into business for himself. The Operating Company's directors, who seem to have included the rector and vestrymen of the church, passed the following resolution upon his resignation: "Be it resolved that in appreciation of the services rendered by Mr. Stanton . . . a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The Operating Company's action was later explained by one of its directors as based on the fact that, "Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation. He did a splendid piece of work, we felt. Besides that . . . he was liked by all of the members of the Vestry personally." And by another: "[W]e were all unanimous in wishing to make Mr. Stanton a gift. Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard. We understood

that he was going in business for himself. We felt that he was entitled to that evidence of good will."

On the other hand, there was a suggestion of some ill-feeling between Stanton and the directors, arising out of the recent termination of the services of one Watkins, the Operating Company's treasurer, whose departure was evidently attended by some acrimony. At a special board meeting on October 28, 1942, Stanton had intervened on Watkins' side and asked reconsideration of the matter. The minutes reflect that "resentment was expressed as to the 'presumptuous' suggestion that the action of the Board, taken after long deliberation, should be changed." The Board adhered to its determination that Watkins be separated from employment, giving him an opportunity to resign rather than be discharged. At another special meeting two days later it was revealed that Watkins had not resigned; the previous resolution terminating his services was then viewed as effective; and the Board voted the payment of six months' salary to Watkins in a resolution similar to that quoted in regard to Stanton, but which did not use the term "gratuity." At the meeting, Stanton announced that in order to avoid any such embarrassment or question at any time as to his willingness to resign if the Board desired, he was tendering his resignation. It was tabled, though not without dissent. The next week, on November 5, at another special meeting, Stanton again tendered his resignation which this time was accepted.

The "gratuity" was duly paid. So was a smaller one to Stanton's (and the Operating Company's) secretary, under a similar resolution, upon her resignation at the same time. The two corporations shared the expense of the payments. There was undisputed testimony that there were in fact no enforceable rights or claims to pension and retirement benefits which had not accrued at the time of the taxpayer's resignation, and that the last

proviso of the resolution was inserted simply out of an abundance of caution. The taxpayer received in cash a refund of his contributions to the retirement plans, and there is no suggestion that he was entitled to more. He was required to perform no further services for Trinity after his resignation.

The Commissioner asserted a deficiency against the taxpayer after the latter had failed to include the payments in question in gross income. After payment of the deficiency and administrative rejection of a refund claim, the taxpayer sued the United States for a refund in the District Court for the Eastern District of New York. The trial judge, sitting without a jury, made the simple finding that the payments were a "gift,"³ and judgment was entered for the taxpayer. The Court of Appeals for the Second Circuit reversed. 268 F. 2d 727.

The Government, urging that clarification of the problem typified by these two cases was necessary, and that the approaches taken by the Courts of Appeals for the Second and the Sixth Circuits were in conflict, petitioned for certiorari in No. 376, and acquiesced in the taxpayer's petition in No. 546. On this basis, and because of the importance of the question in the administration of the income tax laws, we granted certiorari in both cases. 361 U. S. 923.

The exclusion of property acquired by gift from gross income under the federal income tax laws was made in the first income tax statute⁴ passed under the authority of the Sixteenth Amendment, and has been a feature of the income tax statutes ever since. The meaning of the term "gift" as applied to particular transfers has always been a matter of contention.⁵ Specific and illuminating

³ See note 14, *infra*.

⁴ § 11.B., c. 16, 38 Stat. 167.

⁵ The first case of the Board of Tax Appeals officially reported in fact deals with the problem. *Parrott v. Commissioner*, 1 B. T. A. 1.

legislative history on the point does not appear to exist. Analogies and inferences drawn from other revenue provisions, such as the estate and gift taxes, are dubious. See *Lockard v. Commissioner*, 166 F. 2d 409. The meaning of the statutory term has been shaped largely by the decisional law. With this, we turn to the contentions made by the Government in these cases.

First. The Government suggests that we promulgate a new "test" in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise.* We reject this invitation. We are of opinion that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases. The cases at bar are fair examples of the settings in which the problem usually arises. They present situations in which payments have been made in a context with business overtones—an employer making a payment to a retiring employee; a businessman giving something of value to another businessman who has been of advantage to him in his business. In this context, we review the law as established by the prior cases here.

The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a

*The Government's proposed test is stated: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."

legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 730. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U. S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U. S. 711, 714.⁷ A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner v. LoBue*, 351 U. S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson v. United States*, *supra*, at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner*, 302 U. S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.*, at 45 (dissenting opinion).⁸

The Government says that this "intention" of the transferor cannot mean what the cases on the common-

⁷ The cases including "tips" in gross income are classic examples of this. See, e. g., *Roberts v. Commissioner*, 176 F. 2d 221.

⁸ The parts of the *Bogardus* opinion which we touch on here are the ones we take to be basic to its holding, and the ones that we read as stating those governing principles which it establishes. As to them we see little distinction between the views of the Court and those taken in dissent in *Bogardus*. The fear expressed by the dissent at 302 U. S., at 44, that the prevailing opinion "seems" to hold "that every payment which in any aspect is a gift is . . . relieved of any tax" strikes us now as going beyond what the opinion of the Court held in fact. In any event, the Court's opinion in *Bogardus* does not seem to have been so interpreted afterwards. The principal difference, as we see it, between the Court's opinion and the dissent lies in the weight to be given the findings of the trier of fact.

law concept of gift call "donative intent." With that we are in agreement, for our decisions fully support this. Moreover, the *Bogardus* case itself makes it plain that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality. 302 U. S., at 40. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.

It is suggested that the *Bogardus* criterion would be more apt if rephrased in terms of "motive" rather than "intention." We must confess to some skepticism as to whether such a verbal mutation would be of any practical consequence. We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

Second. The Government's proposed "test," while apparently simple and precise in its formulation, depends frankly on a set of "principles" or "presumptions" derived from the decided cases, and concededly subject to various exceptions; and it involves various corollaries, which add to its detail. Were we to promulgate this test as a matter of law, and accept with it its various presuppositions and stated consequences, we would be passing far beyond the requirements of the cases before us, and would be painting on a large canvas with indeed a broad brush. The Government derives its test from such propositions as the following: That payments by an employer to an employee, even though voluntary, ought, by and large, to be taxable; That the concept of a gift is inconsistent with a payment's being a deductible business expense; That a gift involves "personal" elements; That a business corporation cannot properly make a gift of its assets. The

Government admits that there are exceptions and qualifications to these propositions. We think, to the extent they are correct, that these propositions are not principles of law but rather maxims of experience that the tribunals which have tried the facts of cases in this area have enunciated in explaining their factual determinations. Some of them simply represent truisms: it doubtless is, statistically speaking, the exceptional payment by an employer to an employee that amounts to a gift. Others are overstatements of possible evidentiary inferences relevant to a factual determination on the totality of circumstances in the case: it is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms. Neither factor is a shibboleth. The taxing statute does not make nondeductibility by the transferor a condition on the "gift" exclusion; nor does it draw any distinction, in terms, between transfers by corporations and individuals, as to the availability of the "gift" exclusion to the transferee. The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of all the factors.

Specifically, the trier of fact must be careful not to allow trial of the issue whether the receipt of a specific payment is a gift to turn into a trial of the tax liability, or of the propriety, as a matter of fiduciary or corporate law, attaching to the conduct of someone else. The major corollary to the Government's suggested "test" is that, as an ordinary matter, a payment by a corporation cannot be a gift, and, more specifically, there can be no such thing as a "gift" made by a corporation which would allow it to take a deduction for an ordinary and necessary business expense. As we have said, we find no basis for such a conclusion in the statute; and if it were applied as a determinative rule of "law," it would force the tribunals

trying tax cases involving the donee's liability into elaborate inquiries into the local law of corporations or into the peripheral deductibility of payments as business expenses. The former issue might make the tax tribunals the most frequent investigators of an important and difficult issue of the laws of the several States, and the latter inquiry would summon one difficult and delicate problem of federal tax law as an aid to the solution of another.⁹ Or perhaps there would be required a trial of the vexed issue whether there was a "constructive" distribution of corporate property, for income tax purposes, to the corporate agents who had sponsored the transfer.¹⁰ These considerations, also, reinforce us in our conclusion that while the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, neither they, nor any more detailed statement than has been made, can be laid down as a matter of law.

Third. Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the

⁹ Justice Cardozo once described in memorable language the inquiry into whether an expense was an "ordinary and necessary" one of a business: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering*, 290 U. S. 111, 115. The same comment well fits the issue in the cases at bar.

¹⁰ Cf., e. g., *Nelson v. Commissioner*, 203 F. 2d 1.

necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227; *Commissioner v. Heininger*, 320 U. S. 467, 475; *United States v. Yellow Cab Co.*, 338 U. S. 338, 341; *Bogardus v. Commissioner*, *supra*, at 45 (dissenting opinion).¹¹

This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does. But we see it as implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried. If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain

¹¹ In *Bogardus*, the Court was divided 5 to 4 as to the scope of review to be extended the fact-finder's determination as to a specific receipt, in a context like that of the instant cases. The majority held that such a determination was "a conclusion of law or at least a determination of a mixed question of law and fact." 302 U. S. at 39. This formulation it took as justifying it in assuming a fairly broad standard of review. The dissent took a contrary view. The approach of this part of the Court's ruling in *Bogardus*, which we think was the only part in which there was real division among the Court, see note 8, *supra*, has not been afforded subsequent respect here. In *Heininger*, a question presenting at the most elements no more factual and untechnical than those here—that of the "ordinary and necessary" nature of a business expense—was treated as one of fact. Cf. note 9, *supra*. And in *Dobson v. Commissioner*, 320 U. S. 480, 498, n. 22, *Bogardus* was adversely criticized, insofar as it treated the matter as reviewable as one of law. While *Dobson* is, of course, no longer the law insofar as it ordains a greater weight to be attached to the findings of the Tax Court than to those of any other fact-finder in a tax litigation, see note 13, *infra*, we think its criticism of this point in the *Bogardus* opinion is sound in view of the dominant importance of factual inquiry to decision of these cases.

12 COMMISSIONER v. DUBERSTEIN.

factors and making them determinative of the matter, as it has done in one field of the "gift" exclusion's former application, that of prizes and awards.¹² Doubtless diversity of result will tend to be lessened somewhat since federal income tax decisions, even those in tribunals of first instance turning on issues of fact, tend to be reported, and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters. But the question here remains basically one of fact, for determination on a case-by-case basis.

One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker v. Texas & Pacific R. Co.*, *supra*, at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52 (a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U. S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.*, at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339

¹² I. R. C., § 74, which is a provision new with the 1954 Code. Previously, there had been holdings that such receipts as the "Pot O'Gold" radio giveaway, *Washburn v. Commissioner*, 5 T. C. 1333, and the Ross Essay Prize, *McDermott v. Commissioner*, 80 U. S. App. D. C. 176, 150 F. 2d 585, were "gifts." Congress intended to obviate such rulings. S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. We imply no approval of those holdings under the general standard of the "gift" exclusion. Cf. *Robertson v. United States*, *supra*.

U. S. 605, 609-610. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I. R. C., § 7482 (a).¹³

Fourth. A majority of the Court is in accord with the principles just outlined. And, applying them to the *Duberstein* case, we are in agreement, on the evidence we have set forth, that it cannot be said that the conclusion of the Tax Court was "clearly erroneous." It seems to us plain that as trier of the facts it was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future. We cannot say with the Court of Appeals that such a conclusion was "mere suspicion" on the Tax Court's part. To us it appears based in the sort of informed experience with human affairs that fact-finding tribunals should bring to this task.

As to *Stanton*, we are in disagreement. To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a "gift."¹⁴ To be sure, concise-

¹³ "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." The last words first came into the statute through an amendment to § 1141 (a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U. S. 489. Cf. note 11, *supra*. See *Grace Bros., Inc. v. Commissioner*, 173 F. 2d 170, 173.

¹⁴ The "Findings of Fact and Conclusions of Law" were made orally, and were simply: "The Resolution of the Board of Directors

ness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See *Matton Oil Transfer Corp. v. The Dynamic*, 123 F. 2d 999, 1000-1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to "find the facts specially and state separately . . . conclusions of law thereon." While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive. While the judgment of the Court of Appeals cannot stand, the four of us think there must be further proceedings in the District Court looking toward new and adequate findings of fact. In this, we are joined by MR. JUSTICE WHITTAKER, who agrees that the findings were inadequate, although he does not concur generally in this opinion.

Accordingly, in No. 376, the judgment of this Court is that the judgment of the Court of Appeals is reversed.

of the Trinity Operating Company, Incorporated, held November 18, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen [sic] D. Stanton, in the amount of \$2,000 payable to him in monthly installments of \$2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943."

and in No. 546, that the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result in No. 370. In No. 546, he would affirm the judgment of the Court of Appeals for the reasons stated by MR. JUSTICE FRANKFURTER.

MR. JUSTICE WHITTAKER, agreeing with *Bogardus* that whether a particular transfer is or is not a "gift" may involve "a mixed question of law and fact," 302 U. S., at 39, concurs only in the result of this opinion.

MR. JUSTICE DOUGLAS dissents, since he is of the view that in each of these two cases there was a gift under the test which the Court fashioned nearly a quarter of a century ago in *Bogardus v. Commissioner*, 302 U. S. 34.

SUPREME COURT OF THE UNITED STATES

Nos. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner, 376 v. Mose Duberstein, et al.	} On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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Alden D. Stanton, et al., 546 v. United States of America.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[June 13, 1960.]

MR. JUSTICE BLACK, concurring and dissenting.

I agree with the Court that it was not clearly erroneous for the Tax Court to find as it did in No. 376 that the automobile transfer to Duberstein was not a gift, and so I agree with the Court's opinion and judgment reversing the judgment of the Court of Appeals in that case.

I dissent in No. 546, *Stanton v. United States*. The District Court found that the \$20,000 transferred to Mr. Stanton by his former employer at the end of ten years' service was a gift and therefore exempt from taxation under I. R. C. of 1939, § 22 (b)(3) (now I. R. C. of 1954, § 102 (a)). I think the finding was not clearly erroneous and that the Court of Appeals was therefore wrong in reversing the District Court's judgment. While conflicting inferences might have been drawn, there was evidence to show that Mr. Stanton's long services had been satisfactory, that he was well-liked personally and had given splendid service, that the employer was under no obligation at all to pay any added compensation, but made the \$20,000 payment because prompted by a genuine desire to make him a "gift," to award him a "gratuity." Cf.

Commissioner v. LoBue, 351 U. S. 243, 246-247. The District Court's finding was that the added payment "constituted a gift to the taxpayer, and therefore need not have been reported by him as income" The trial court might have used more words, or discussed the facts set out above in more detail, but I doubt if this would have made its crucial, adequately supported finding any clearer. For this reason I would reinstate the District Court's judgment for petitioner.

SUPREME COURT OF THE UNITED STATES

NOS. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner.	}	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
376 v.		
Mose Duberstein, et al.		

Alden D. Stanton, et al., Petitioners,	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
546 v.		
United States of America.		

[June 13, 1960.]

MR. JUSTICE FRANKFURTER concurring in the judgment in No. 376 and dissenting in No. 546.

As the Court's opinion indicates, we brought these two cases here partly because of a claimed difference in the approaches between two Courts of Appeals but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a "gift" and is not to be included in income for purposes of ascertaining the "gross income" under the Internal Revenue Code. As soon as this problem emerged after the imposition of the first income tax authorized by the Sixteenth Amendment, it became evident that its inherent difficulties and subtleties would not easily yield to the formulation of a general rule or test sufficiently definite to confine within narrow limits the area of judgment in applying it. While at its core the tax conception of a gift no doubt reflected the non-legal, non-technical notion of a benefaction unentangled with any aspect of worldly requital, the divers blends of personal and pecuniary relationships in our industrial society

inevitably presented niceties for adjudication which could not be put to rest by any kind of general formulation.

Despite acute arguments at the bar and a most thorough re-examination of the problem on a full canvass of our prior decisions and an attempted fresh analysis of the nature of the problem, the Court has rejected the invitation of the Government to fashion anything like a litmus paper test for determining what is excludable as a "gift" from gross income. Nor has the Court attempted a clarification of the particular aspects of the problem presented by these two cases, namely, payment by an employer to an employee upon the termination of the employment relation and non-obligatory payment for services rendered in the course of a business relationship. While I agree that experience has shown the futility of attempting to define, by language so circumscribing as to make it easily applicable, what constitutes a gift for every situation where the problem may arise, I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations.

Thus, regarding the two frequently recurring situations involved in these cases—things of value given to employees by their employers upon the termination of employment and payments entangled in a business relation and occasioned by the performance of some service—the strong implication is that the payment is of a business nature. The problem in these two cases is entirely different from the problem in a case where a payment is made from one member of a family to another, where the implications are directly otherwise. No single general formulation appropriately deals with both types of cases, although both involve the question whether the payment was a "gift." While we should normally suppose that a payment from father to son was a gift, unless the contrary

is shown, in the two situations now before us the business implications are so forceful that I would apply a presumptive rule placing the burden upon the beneficiary to prove the payment wholly unrelated to his services to the enterprise. The Court, however, has declined so to analyze the problem and has concluded "that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."

The Court has made only one authoritative addition to the previous course of our decisions. Recognizing *Bogardus v. Commissioner*, 302 U. S. 34, as "the leading case here" and finding essential accord between the Court's opinion and the dissent in that case, the Court has drawn from the dissent in *Bogardus* for infusion into what will now be a controlling qualification, recognition that it is "for the triers of the facts to seek among competing aims or motives the ones that dominated conduct." 302 U. S. 34, 45 (dissenting opinion). All this being so in view of the Court, it seems to me desirable not to try to improve what has "already been spelled out" in the opinions of this Court but to leave to the lower courts the application of old phrases rather than to float new ones and thereby inevitably produce a new volume of exegesis on the new phrases.

Especially do I believe this when fact-finding tribunals are directed by the Court to rely upon their "experience with the mainsprings of human conduct" and on their "informed experience with human affairs" in appraising the totality of the facts of each case. Varying conceptions regarding the "mainsprings of human conduct" are derived from a variety of experiences or assumptions about the nature of man, and "experience with human

affairs," is not only diverse but often drastically conflicting. What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law. I am afraid that by these new phrasings the practicalities of tax administration, which should be as uniform as is possible in so vast a country as ours, will be embarrassed. By applying what has already been spelled out in the opinions of this Court, I agree with the Court in reversing the judgment in *Commissioner of Internal Revenue v. Duberstein*.

But I would affirm the decision of the Court of Appeals for the Second Circuit in *Stanton v. United States*. I would do so on the basis of the opinion of Judge Hand and more particularly because the very terms of the resolution by which the \$20,000 was awarded to Stanton indicated that it was not a "gratuity" in the sense of sheer benevolence but in the nature of a generous lagniappe, something extra thrown in for services received though not legally nor morally required to be given. This careful resolution, doubtless drawn by a lawyer and adopted by some hardheaded businessmen, contained a proviso that Stanton should abandon all rights to "pension and retirement benefits." The fact that Stanton had no such claims does not lessen the significance of the clause as something "to make assurance doubly sure." 268 F. 2d 728. The business nature of the payment is confirmed by the words of the resolution, explaining the "gratuity" as "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc." The force of this document, in light of all the factors to which Judge Hand adverted in his opinion, was not in the least diminished by testimony at the trial. Thus

the taxpayer has totally failed to sustain the burden I would place upon him to establish that the payment to him was wholly attributable to generosity unrelated to his performance of his secular business functions as an officer of the corporation of the Trinity Church of New York and the Trinity Operating Co. Since the record totally fails to establish taxpayer's claim, I see no need of specific findings by the trial judge.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 546

ALDEN D. STANTON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 27, 1959

CERTIORARI GRANTED DECEMBER 14, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 546

ALDEN D. STANTON, ET AL., PETITIONERS,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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[fol. 1]

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK**

No. 14475

ALDEN D. STANTON AND LOUISE M. STANTON,

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

1954

6-11-54 Complaint Filed—Summons Issued.

6-15-54 Summons ret'd filed—Served on Deft.

8-13-54 Order extending time to answer to Oct. 13, '54
Filed.

10-11-54 Answer Filed.

1955

2-18-55 Deposition of Woolsey A. Shepard Filed.

3- 1-55 Notice of filing of deposition with proof of service filed.

3- 1-55 Note of issue filed.

4- 4-55 Galston call cal—Reddy.

7-26-55 Notice of motion filed for summary judgt (ret. Aug. 10-55).

8-10-55 Bruchhausen, J. Motion for Summary Judgt adjd to 8-31-55.

8-31-55 Abruzzo, J. Motion for Summary Judgt argued decision reserved. Exchange 9-7-55 all papers 9-9-55.

[fol. 2]

1955

Affidavit of George T. Rita filed.

9-7-55 Affidavit of George T. Rita in opposition to above motion filed.

9-12-55 Supplemental affidavit of Clendon H. Lee filed.

9-28-55 By Abruzzo, J. Decision on Motion for Summary Judgment—Motion Denied—See Opinion.

10-10-55 By Abruzzo J. order filed denying motion for summary judgment.

1957

2-8-57 Before Abruzzo, J. Case Called Ready & Passed.

8-22-57 Notice of motion for pretrial filed (9-4-57).

9-4-57 Before Rayfiel, J. motion for pretrial granted 9-26-57.

10-18-57 Notice of Taking Deposition Filed.

1958

3-4-58 Zavatt, J. Case called Ready. Pre-Trial Conference Mar. 18, 1958 at 11:00 a.m. (later, adjd to 3-26-58 2 P.M.).

3-26-58 Zavatt, J. Case called. Conference held & concluded. No settlement.

9-16-58 Abruzzo, J. Case Called—Ready.

9-17-58 Abruzzo, J. Case Called. Assigned to Judge Zavatt.

9-18-58 Zavatt, J. case R.P.

10-2-58 Plaintiffs Trial Memorandum Filed as directed.

10-6-58 Bruchhausen, J. Case called. R & P.

10-15-58 Byers, Ch. J. Case called. Adjd to Oct. 20, 1958.

1958

10-20-58 Byers, Ch. J. Case called: Ready & Passed to Oct. 23, 1958.

[fol. 3]

10-23-58 Byers, Ch. J. Case called. Ready & Passed.

10-27-58 Byers, Ch. J. Case called. Ready & Passed.

10-28-58 Byers, Ch. J. Case called. Trial begun and concluded. At conclusion of taking of testimony, Court makes findings of fact, in favor of the Plaintiff. Settle Judgment on notice.

11-17-58 By Byers, J. Judgment filed & Docketed against Deft for \$15,056.29 with interest.

12-22-58 Notice of appeal filed.

1959

1-30-59 Notice of Motion filed to ext time of Deft to file appeal to Mar. 20, 1959 (2-11-59).

2-6-59 Affidavit of Clendon H. Lee filed.

2-11-59 Bruchhausen, J. Hearing on motion to extend time of Deft. to file appeal etc. granted—Settle Order.

2-19-59 By Bruchhausen, J. Order filed extending time to file record on appeal to Mar. 20, 1959.

3-18-59 Stenographers minutes filed.

3-19-59 Record on Appeal handed to Miss Lamm (U.S. Atty office) cert. & with 3 copies of Index to be delvd to C of A.

3-23-59 Copy of Index on appeal recd from C. of A. acknowledging record on appeal filed.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—June 11, 1954

The Plaintiffs, appearing herein by their attorneys, O'Connor & Farber, for their complaint against the Defendant, respectfully show to this Court, and upon information and belief allege as follows:

1. This action is brought under Title 28, United States Code, Section 1346 and Section 1402(a), as hereinafter more fully appears.

2. At all times hereinafter mentioned, the Plaintiffs were, and now are citizens of the State of New York, residing at 453 Greene Avenue, in the Borough of Brooklyn, County of Kings, State of New York.

3. At all times subsequent to May 21, 1944 until October 23, 1951, one Joseph P. Marcelle, was Collector of Internal Revenue for the First District of New York, and at all times subsequent to October 23, 1951 through June 30, 1952, one Henry L. Hoffman, was acting Collector of Internal Revenue for the First District of New York, and at all times subsequent to June 30, 1952 through April 10, 1954 the said Henry L. Hoffman was District Director of Internal Revenue for the Brooklyn District. Neither the said Joseph P. Marcelle nor the said Henry L. Hoffman is in office as Collector of Internal Revenue at the time this action is commenced.

4. This suit is brought for the recovery of \$15,056.29, representing \$10,629.57 erroneously and illegally assessed against the Plaintiffs as income tax for the calendar year 1943 and \$4,426.72 as interest thereon, and as such, erroneously and illegally collected from the Plaintiffs by said Joseph P. Marcelle, as Collector of Internal Revenue; and the said Henry L. Hoffman, as Acting Collector of Internal Revenue.

[fol. 5] 5. In 1942, the Plaintiff Alden D. Stanton was Comptroller of the Corporation of Trinity Church and

President of Trinity Operating Company, Inc. The latter Corporation was a wholly owned subsidiary of the Corporation of Trinity Church and was engaged in managing its properties. The Plaintiff Alden D. Stanton tendered his resignations from the said offices in 1942 and, on November 9, 1942, the resignations were accepted. At a meeting of the Board of Directors of Trinity Operating Company, Inc. held November 19, 1942, after the resignations had been accepted, a gratuity was voted to the Plaintiff Alden D. Stanton in the amount of \$20,000., payable to him in monthly installments of \$2,000. each, commencing with the month of December, 1942. In December, 1942, the said Plaintiff received \$2,000. of said gratuity and, in 1943, said Plaintiff received \$18,000. of said gratuity.

6. The resolution of the Board of Directors of Trinity Operating Company, Inc. provided that:

"A gratuity is hereby awarded to him (Plaintiff Alden D. Stanton) of Twenty Thousand Dollars."

Subsequently, the payments were divided between that company and the Corporation of Trinity Church; the Church paying \$9,600. and Trinity Operating Company paying \$10,400. Each corporation entered the payment to the said Plaintiff on the corporate books as a gratuity.

7. The salary received by the Plaintiff Alden D. Stanton prior to the date of his resignation was at the annual rate of \$12,000. from Trinity Church, and \$10,500. from Trinity Operating Company, Inc.

8. Within the time prescribed by law, the Plaintiffs duly made and filed with the Collector of Internal Revenue for the First District of New York, then in office, their joint income tax returns for the calendar years 1942 and [Vol. 6] 1943, and during the years 1943 and 1944 duly paid to the Collector of Internal Revenue for the First District of New York, then in office, the income tax assessed upon such returns. In their joint income tax returns for the years 1942 and 1943, filed as aforesaid, the Plaintiffs reported the amount of said gratuity, but omitted from gross income, as a gift, the amount thereof.

9. Thereafter, the Commissioner of Internal Revenue caused the aforesaid returns of the Plaintiffs for the calendar years 1942 and 1943 to be examined and, as a result of such examination, the Commissioner determined that there was a deficiency in income tax due from the Plaintiffs for the calendar year 1943 in the amount of \$10,629.57, and assessed against the Plaintiffs as additional income tax for the calendar year 1943, said sum of \$10,629.57. In reaching his determination that there was a deficiency in income tax due from the Plaintiffs for the year 1943, the Commissioner of Internal Revenue refused to allow as an exclusion from gross income the aforesaid gratuity of \$20,000. received by the Plaintiff Alden D. Stanton and the entire amount of the aforesaid deficiency resulted from the refusal of the Commissioner to allow such exclusion.

10. Thereafter, on or about December 5, 1949, the said Joseph P. Marcelle, as Collector of Internal Revenue for the First District of New York, demanded of the Plaintiffs said sum of \$10,629.57 as additional income tax for the year 1943 and, in addition thereto, the sum of \$3,595.85 as interest upon such additional tax. From January 24, 1950 to January 23, 1952, in installment payments, the Plaintiffs paid to the said Joseph P. Marcelle and the said Joseph P. Marcelle collected from the Plaintiffs as additional income tax for the year 1943 the sum of \$5,929.57, and as interest upon the additional tax assessed, the sum [fol. 7] of \$3,595.85, and the Plaintiffs paid to the said Henry L. Hoffman and the said Henry L. Hoffman collected from the Plaintiffs as additional income tax for the year 1943, the sum of \$4,700. and as interest upon such additional tax, the sum of \$830.87.

11. On or about January 23, 1952, and prior to January 24, 1952, the Plaintiffs duly filed with the said Henry L. Hoffman a claim for the refund of \$15,056.29, alleged to have been erroneously and illegally assessed against and collected from them as income tax and interest thereon for the calendar year 1943. A true copy of said claim for

7

refund, marked Exhibit A, is annexed hereto and made a part hereof.

12. On November 7, 1952 the Commissioner of Internal Revenue notified the Plaintiffs by registered mail of the rejection and disallowance on the schedule of the aforesaid claim for refund.

13. The amount of the aforesaid gratuity of \$20,000 was properly excluded from gross income by the Plaintiffs in their income tax returns for the years 1942 and 1943 pursuant to the provisions of Section 22(b)(3) of the Internal Revenue Code, and the refusal of the Commissioner of Internal Revenue to allow such exclusion in determining the income tax liability of the Plaintiffs for the year 1943 was erroneous and without warrant in law. By reason of such error, there has been erroneously and illegally assessed against and collected from the Plaintiffs and paid into the Treasury of the United States, as income tax for the year 1943, and interest thereon, the sum of \$15,056.29. Said sum of \$15,056.29 was illegally, and without warrant and authority of law, demanded and collected by the said Joseph P. Marcelle and Henry L. Hoffman from the Plaintiffs in installments from January 24, 1950 to January 23, 1952.

[fol. 8] 14. Although repayment thereof has been demanded, no part of the said sum of \$15,056.29 has been credited, remitted, refunded or repaid to the Plaintiffs or to anyone on their account, and the full amount thereof, as indicated by the schedule appended hereto as Exhibit A, together with interest thereon from the dates of payment at the rate of one-half ($\frac{1}{2}\%$) per cent per month, remain due and owing from the Defendant to the Plaintiffs.

Wherefore, the Plaintiffs demand judgment against the Defendant, United States of America, for the sum of \$15,056.29, with interest thereon at the rate of one-half ($\frac{1}{2}\%$) per cent per month on installment payments made at the following times and in the following amounts:

January	24, 1950	\$ 4,595.85
February	7, 1950	1,629.57
March	7, 1950	1,000.00
May	11, 1950	500.00
January	11, 1951	100.00
January	18, 1951	100.00
January	25, 1951	100.00
February	2, 1951	100.00
February	8, 1951	100.00
February	15, 1951	100.00
February	24, 1951	100.00
March	2, 1951	100.00
May	7, 1951	100.00
May	14, 1951	100.00
June	4, 1951	100.00
July	11, 1951	100.00
July	23, 1951	100.00
August	1, 1951	100.00
August	9, 1951	100.00
August	21, 1951	100.00
September	5, 1951	100.00
September	21, 1951	100.00
November	1, 1951	100.00
December	6, 1951	100.00
December	26, 1951	100.00
January	23, 1952	5,230.87
		<hr/>
		\$15,056.29

together with the costs and disbursements of this action:

O'Connor & Farber, By William F. Snyder, Partner.

[fol. 9]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 11, 1954

The United States of America by its attorney, Leonard P. Moore, United States Attorney for the Eastern District of New York, for answer to the complaint alleges:

1. Admits each and every allegation in paragraph 1 of the complaint.

2. Admits each and every allegation in paragraph 2 of the complaint.

3. Admits each and every allegation in paragraph 3 of the complaint.

4. Denies each and every allegation in paragraph 4 of the complaint, except it admits that suit is brought for the recovery of \$15,056.29 taxes and interest.

5. Denies each and every allegation in paragraph 5 of the complaint.

6. Denies each and every allegation in paragraph 6 of the complaint.

7. Admits each and every allegation in paragraph 7 of the complaint.

8. Denies each and every allegation in paragraph 8 of the complaint, except it admits that plaintiffs filed joint income tax returns for the years 1942 and 1943 and paid their taxes.

9. Denies each and every allegation in paragraph 9 of the complaint, except it admits that the Commissioner of Internal Revenue determined that there was a deficiency in income tax due from the plaintiffs for the calendar year 1943 in the amount of \$10,629.57 and assessed additional income tax for the year 1943 in that amount.

10. Admits each and every allegation in paragraph 10 of the complaint.

[fol. 10] 11. Denies each and every allegation in paragraph 11 of the complaint, except it admits that plaintiffs filed a claim for refund in the amount of \$15,056.29. It further admits that Exhibit A is a true copy of that claim for refund.

12. Admits each and every allegation in paragraph 12 of the complaint.

13. Denies each and every allegation in paragraph 13 of the complaint.

14. Denies each and every allegation in paragraph 14 of the complaint, except it admits that no part of the amount claimed by the plaintiffs has been paid to them.

Wherefore, defendant demands judgment dismissing the complaint.

Leonard R. Moore, United States Attorney, Eastern District of New York, Attorney for Defendant, 271 Washington Street, Brooklyn, New York, By: Elliott Kahaner, Assistant United States Attorney.

[fol. 11]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed Jul. 26, 1955

The plaintiffs move the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that the plaintiffs are entitled to judgment as a matter of law.

2. This motion is based upon:

(a) Affidavit of Alden D. Stanton, duly verified the 25th day of July, 1955, annexed hereto;

(b) Deposition of Woolsey A. Sheppard of January 17, 1955, duly filed the 18th day of February, 1955, true copy of which is annexed hereto;

(c) Affidavit of Reginald R. Belknap, duly verified the 16th day of February, 1955, annexed hereto;

(d) Summons and complaint, true copies of which are annexed hereto; and

(e) Answer, true copy of which is annexed hereto.

Dated, New York, N. Y., July 25, 1955.

Yours, etc.

O'Connor & Farber, By William F. Snyder, A Member of the Firm, Attorneys for Plaintiffs, Office and Post Office Address, 120 Broadway, New York 5, N. Y.

[fol. 12]

IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION DENYING MOTION FOR SUMMARY
JUDGMENT—September 28, 1955

ABRUZZO, D.J.:

Plaintiffs instituted this action to recover the sum of \$15,056.29 representing income taxes for the calendar year 1943 and interest which they allege was erroneously and illegally assessed and was erroneously and illegally collected by the Collector and Acting Collector of Internal Revenue for the First District of New York.

The action is brought under Title 28 of the United States Code, Sections 1346 and 1402(a).

All factual references will refer to the plaintiff, Alden D. Stanton. The plaintiff, Louise M. Stanton, is the wife of Alden D. Stanton and she was named as a party-plaintiff because she and her husband filed a joint income tax return for the year in question.

In 1933 or 1934 plaintiff entered the employ of Trinity Church to manage its real property. Thereafter a New York corporation was formed known as Trinity Operating Company, Inc., and plaintiff became president and a member of the board of directors of the operating company. He eventually was named comptroller of the church but was never a vestryman or warden thereof. He was actively

engaged on a full-time basis in managing the real estate investments of Trinity Church and its subsidiaries and in reorganizing and rehabilitating their properties, and in 1942 had been receiving an annual salary of \$22,500.

Desiring to engage in business on his own, he submitted his resignations on November 9, 1942, as comptroller of Trinity Church and president of the operating company to become effective at the pleasure of the vestry and of the board of directors respectively. The resignations were accepted to become effective November 30, 1942. He was not discharged but resigned voluntarily.

On November 19, 1942, at a meeting of the board of directors of the operating company the following preambles and resolution were adopted:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

Plaintiff was not present at the meeting nor did he vote on such resolution or participate in any way in the discussions which preceded it. The payments in the aggregate amount of \$20,000 were paid, \$9,600 by Trinity Church and \$10,400 by the operating company, and the reason

why the payments were made in instalments rather than in a lump sum was to avoid placing any undue burden on the church and its subsidiaries. There was no consideration [fol. 14] whatever which entered into the passing of the resolution nor did the church or any of its subsidiaries owe the plaintiff any money on account of salary or for any other reason. The \$20,000 was paid to plaintiff as a gratuity and bore no relationship to his salary and was treated by the donor as a gratuity on its books. Neither the church nor the operating company received any federal tax benefit on account of the gratuity paid to the plaintiff, nor were any amounts withheld from such payments.

Plaintiff had been a member of the pension plan of Trinity Church but contributions paid by him were returned to him subsequent to his resignation.

Plaintiff and Mrs. Stanton filed joint income tax returns for the years 1942 and 1943 and paid the income tax assessed. In such returns the amount of the gratuity was set forth as a gift but was excluded from gross income. The returns were audited and the Commissioner of Internal Revenue determined that there was a deficiency in taxes from plaintiff for the year 1943 in the amount of \$10,629.57, based on plaintiff's alleged erroneous exclusion of the gratuity from gross income of the plaintiffs. The deficiency together with interest was assessed against the plaintiffs and they paid the tax and interest in the total amount of \$15,056.29 to the Collector of Internal Revenue.

Plaintiffs filed a claim for refund but the claim was rejected and disallowed and they have instituted this action to recover said amount. They are now moving for summary judgment.

The summary of facts above related are those set forth in the papers submitted by plaintiffs in support of their motion and are not in any way controverted by the defendant, but in opposing this motion the defendant raises the objection that it has had no opportunity to cross-examine [fol. 15] the plaintiff, Alden D. Stanton, and Reginald R. Beiknap, a vestryman and church-warden of Trinity Church who has submitted an affidavit in support of plaintiffs' application. The defendant contends that the ultimate fact is whether or not a gift was made and that this fact can

only be established by showing donative intent; that with respect to this the credibility of plaintiffs' witnesses is of the utmost importance and since the facts are peculiarly within the plaintiffs' knowledge the defendant must have the right of cross-examination, and that the issues raised by the pleading be passed upon by the Court after it has seen plaintiffs on the stand and had an opportunity to judge their credibility.

"If the sum of money under consideration was a gift and not compensation, it is exempt from taxation * * * " *Bogardus v. Commissioner*, 302 U.S. 34, 40 [19 AFTR 1195]. However, this Court is bound by the decisions in this Circuit. In *Arnstein v. Porter*, 154 F.2d 464 (C.A. 2), it was held (p. 471):

But where, as here, credibility, including that of the defendant, is crucial, summary judgment becomes improper and a trial indispensable. It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has offered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true. We think that Rule 56 was not designed thus to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge. * * *

In *Bishop v. Shaughnessy*, 119 F. Supp. 62 (ND NY), it was said (p. 65):

This Court is bound by the decisions within this circuit, and the oft-cited cases of *Doehler v. U. S.*, [vol. 16] 2 Cir., 149 F. 2d 130, and *Arnstein v. Porter*, 2 Cir., 154 F.2d 464, are declaratory of the law. We are admonished in the *Doehler* case that a litigant has a right to a trial where there is the slightest doubt as to the facts. The ultimate fact here is whether or not gifts were made, and that fact depends upon a determination of the donor's intention. In the *Arnstein* case we are further admonished that summary judgment is improper, and a trial indispensable where credibility is crucial. Here, the evidence of a gift is

apparently to be established by evidence of the plaintiff and the members of his family. Certainly credibility here is an important factor. We are further admonished in the Arnstein case that the right of cross-examination is not to be lightly foreclosed, especially as to matters peculiarly within—as in this case—the plaintiff's knowledge. The two cases referred to above have been cited many times, and they have been followed by later decisions within this circuit. *Colby v. Klune*, 2 Cir., 178 F.2d 872; *Fogelson v. American Woolen Co.*, 2 Cir., 170 F.2d 660; *Boro Hall Corp. v. General Motors*, 2 Cir., 164 F.2d 770; *Bozant v. Bank of New York*, 2 Cir., 156 F.2d 787. * * *

In the instant case, defendant has cross-examined Woolsey A. Shepard, a member of the vestry and General Counsel of Trinity Church, whose deposition was taken on December, 1954, but the defendant cannot be foreclosed from cross-examining the plaintiff, Alden D. Stanton, or Reginald R. Belknap, and, therefore, the motion for summary judgment must be denied.

[fol. 17]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR SUMMARY JUDGMENT—
October 10, 1955

At Brooklyn, New York, in said District, on the 10th day of October, 1955.

The plaintiffs having moved this Court by Notice of Motion for an order granting plaintiffs summary judgment and the motion having come on to be heard before me on August 31, 1955, and O'Connor & Farber, attorneys for the plaintiffs having appeared in support of the motion, and Leonard P. Moore, United States Attorney for the Eastern District of New York, having appeared in opposition thereto, and upon reading the affidavits and memoranda of law submitted in support of and in opposition to the motion, and the Court having filed its memorandum opinion,

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the defendant, it is

Ordered, that the plaintiffs' motion for summary judgment be and the same hereby is in all respects denied.

Matthew T. Abruzzo, U. S. D. J.

[fol. 18]

IN UNITED STATES DISTRICT COURT

Transcript of Proceedings

Brooklyn, New York,
October 29, 1958.

Before: Honorable Mortimer W. Byers, U. S. D. J.

APPEARANCES:

Messrs. O'Connor & Farber, Attorneys for Plaintiffs, 120 Broadway, New York, New York, By: Clendon H. Lee, Esq., Of Counsel.

Cornelius W. Wickersham, Jr., Esq., United States Attorney for the Eastern District of New York, By: Lloyd Baker, Esq., Asst. United States Attorney, and

APPEARANCES:

Colloquy Between Court and Counsel

By: George Rita, Esq., Special Assistant to the Attorney General.

The Court: Paragraph five of the complaint, does it deny Stanton was the controller of the corporation?

Mr. Rita: No.

The Court: What is it, that is denied as to that paragraph?

I am trying to find out what the proof is going to be needed. Does the Government require the plaintiff to prove his official status in 1942 as controller of the one corporation and president of the other?

Mr. Rita: We admit that he was the controller of Trinity Church, and president of the operating company.

The Court: Do you see the answer? Have you the answer before you?

Mr. Rita: Yes, your Honor.

Mr. Lee: We have a stipulation in this case if Mr. Rita [fol. 19] will join with me, will obviate the problem on pleadings.

The Court: Well, you see, the answer denies 5 and 6 as alleged in the complaint.

Mr. Rita: That is right.

The Court: I am simply inquiring whether it is going to be necessary to take proof to sustain the allegation.

Mr. Rita: Your Honor, the allegations generally in five were to the very crux of the matter, that is, the allegation was, a gratuity was paid to Mr. Stanton and we deny that.

The Court: Oh, it is the nature of the transaction?

Mr. Rita: That is correct.

The Court: Not the fact of office holding and the fact there was vote taking?

Mr. Rita: We stipulate he was the controller and also the president of the operating company.

The Court: Isn't the word "duly," that is the subject of the denial of paragraph 11, is that all that denial is directed to?

Mr. Rita: No, your Honor, we deny each and every allegation, except admit that a claim had been filed.

Mr. Lee: If the Court please, we have a pretrial stipulation which I assume is filed.

Mr. Rita: I didn't file it.

The Court: I just wanted to find out what matters are really in issue, that is all. Does it get down to a question of whether this sum voted in some way or other is a gift?

Mr. Lee: I believe that is under the pretrial stipulation, if I may read into the record, the pre-trial stipulation dated October 25, 1957.

It is stipulated that the amounts of payments set forth in the complaint are accurate.

[fol. 20] That a proper claim for refund was filed and a refund denied.

It is our understanding, your Honor, that it is set forth in a short trial memorandum which I filed with Judge Zavatt when we thought it was coming before Judge Zavatt.

My understanding is, the only thing in issue here, is the ultimate fact whether it is a gift or compensation.

The Court: Do you agree?

Mr. Rita: The issue is whether or not it was a gift or compensation, that is correct.

The Court: The pre-trial stipulation I think should be incorporated in the record.

I suppose that it will take the place of considerable testimony, won't it?

Mr. Lee: I should think that it would.

I believe the concession of my adversary and my reading of the stipulation should cover that.

Mr. Rita: I should think so.

The Court: You better read it into the record.

Mr. Lee: I previously read Paragraph 1.

I will read Paragraph 2:

"The parties are promptly to prepare a stipulation of facts insofar as they can be stipulated.

"3. Any depositions or discovery proceedings to be completed by January 1, 1958.

"4. The parties stipulate it will take one-half day in which to try the case. Trial is to be before the Court. The case is to be ready for trial by January 1, 1958.

"5. The foregoing provisions are binding on the parties and will control the subsequent course of this litigation unless relieved against on notice of motion because of undue hardship."

[fol. 21] Signed by George G. Rita, on behalf of the Department of Justice, and signed by me on behalf of the plaintiffs.

The Court: Has there been any application to be relieved of that stipulation?

Mr. Lee: No, your Honor.

It was the first paragraph of the stipulation to which I referred a moment ago, which I believe limits the ques-

tion of proof here to a question of whether it is a gift or compensation.

Would it be helpful if I re-read that paragraph?

The Court: Go ahead, all right.

By Mr. Lee: .

"It is stipulated that the amounts of payments set forth in the complaint are accurate, that a proper claim for refund was filed, and a refund was denied."

Shall we proceed?

The Court: Please.

Mr. Lee: We intended to call Mr. Woolsey A. Sheppard, who is the general counsel for Trinity Church, but he is in the hospital with a heart attack:

With the Court's permission, I should like to ask Mr. Frederick Hasler, who is here, if he would read the answers which Mr. Sheppard gave at the deposition which was previously filed, which will be the questions which I will read.

The Court: Yes.

The deposition was sworn to, was it?

Mr. Lee: Yes, your Honor, the deposition was sworn to and filed, and Mr. Rita was present and cross-examined.

The Court: It was the deposition of--

Mr. Lee: Of Woolsey A. Sheppard.

The Court: The deposition was taken?

Mr. Lee: Taken on January 17, 1955, before William J. [fol. 22] Donovan, Notary Public, at the office of O'Connor & Farber, 120 Broadway, New York 5.

It was filed with this Court, February 18, 1955.

The Court: I would like to follow it.

Mr. Hasler: If you are going to ask me questions, I should make a note as usual?

Mr. Lee: No, you are giving Mr. Sheppard's answers.

The Court: I don't suppose you are going to read all of the questions and answers, are you?

Mr. Lee: I will read a good many of them, your Honor.

The Court: Why don't you, for the sake of the record, just specify the ones that you think are important?

The deposition is on file and you can offer it in evidence as part of the case.

I suggest that for the brevity of the record, you merely read the questions and answers that you feel are really material.

Mr. Rita: Your Honor, how about the objections as to relevancy, competency—

The Court: They will be passed upon at the trial.

When you reach a question to which an objection has been made, I will have to rule on it.

By Mr. Lee:

"Q. What is your name, sir?"

Mr. Hasler: Frederick Hasler.

Mr. Lee: No, sir, this is the deposition of—

Mr. Hasler: I speak as if I am Mr. Sheppard?

Mr. Lee: That is correct.

"A. Woolsey A. Sheppard.

"Q. Where do you reside?

"A. Atlantic Highlands, New Jersey.

"Q. Mr. Sheppard, in 1942, were you connected in any way with Trinity Church Corporation.

"A. Yes, sir, I was a member of the Vestry and also of its general counsel.

[fol. 23] "Q. Were you connected with Trinity Operating Company?

"A. Yes, sir, I was its general counsel.

"Q. Did you have any connection with the pension plan of the Trinity Church or of Trinity Operating Company?

"A. Yes, I participated in the making up of that plan and I was one of the trustees under the plan.

"Q. In 1942, was the plaintiff, Allen D. Stanton, employed by Trinity Church, or by Trinity Operating Company?

"A. Yes, by both. He was controller of Trinity Church, and president of Trinity Operating Company.

"Q. Did Trinity Operating Company keep minutes of the meetings of the Board of Directors?

"A. Yes.

"Q. Did the corporation of Trinity Church keep minutes of its meetings?

"A. They did.

"Q. I show you a letter dated December 29, 1942, on the letterhead of Trinity Operating Company, Incorporated, 74 Trinity Place, addressed to Allen D. Stanton, and signed by Reginald R. Belnap, and I ask you whether you recognize the signature?

"A. Yes, I am very familiar with it. I have known Mr. Belnap a great many years.

"Q. Have you seen his signature before?

"A. Yes, a number of times.

"Q. Have you exchanged correspondence with him?

"A. A number of years ago I think I had occasion to write him a letter and received a reply. I don't recall the incident now.

"Q. Do you recognize the signature to be that of Admiral Belnap?

"A. I do."

[fol. 24] Mr. Lee: I offer it in evidence as Plaintiff's Exhibit 1.

Mr. Rita: No objection to that.

The Court: That is the letter dated December 29, '42?

The Clerk: Yes, your Honor.

The Court: To whom?

Mr. Lee: To Allen D. Stanton.

The Court: By?

Mr. Lee: Reginald R. Belnap.

The Court: Plaintiffs' Exhibit No. 1.

(A letter, marked Plaintiffs' Exhibit No. 1 in evidence.)

By Mr. Lee:

"Q. I show you Plaintiffs' Exhibit 1, Mr. Sheppard, and ask you whether that letter correctly sets forth certain resolutions adopted by Trinity Operating Company?

"A. Yes, it sets forth the resolutions in full as they were adopted at the time.

"Q. Now, with respect to the corporation of Trinity Church, were such resolutions ever ratified, or approved by Trinity Church?

"A. Yes, all the minutes of the Operating Company were submitted to the Vestry of Trinity Church for their approval, or correction, as the case may be.

"Q. After such resolutions or minutes were submitted, were they in fact approved, or was any action taken?

"A. My recollection is that these were approved.

"Q. In 1942 did Allen D. Stanton cease to be employed by Trinity Church or Trinity Operating Company?

"A. Yes, sir, he resigned.

"Q. Was such resignation requested?

"A. No, he resigned.

[fol. 25] "Q. Was there any pressure put on him to resign?

"A. None, on the contrary.

"Q. When you say 'on the contrary,' can you tell us what that means?

"A. Well, the Chairman of the Standing Committee requested me to speak to Mr. Stanton, whom I knew personally, ask him if he would reconsider his resignation.

"Q. Did you speak to Mr. Stanton?

"A. I did.

"Q. Was Mr. Stanton paid for his services to Trinity Church?

"A. Yes, sir, he received regular salary.

"Q. At the time of his resignation did Trinity Church or Trinity Operating Company owe Mr. Stanton any money?"

Mr. Rita: That is objected to, it calls for a legal conclusion.

The Court: Overruled, it is a statement of fact.

Mr. Hasler: Do I read Mr. Rita's objection?

The Court: No, read the answer.

Mr. Lee: I asked that question.

"A. At the time of his resignation—"

The Court: The answer is "No."

By Mr. Lee:

"Q. At that time did Mr. Stanton have any claim against Trinity Church or Trinity Operating Company?

"A. None that I know of."

Mr. Rita: I object to it, it calls for a conclusion.

Mr. Lee: There was no objection made.

Mr. Rita: I reserved the right to object.

The Court: Overruled, that is a statement of fact.

Mr. Lee: "A. None that I know of aside from his regular salary.

[fol. 26] "Q. Plaintiffs' Exhibit 1 contains the language: 'A gratuity is hereby awarded to him' (meaning Mr. Stanton) 'of \$20,000.'

"Can you state whether Trinity Church or Trinity Operating Company ever received any Federal income tax benefit by deducting such payment as an expense?

"A. No, Trinity Church being a religious corporation, and the Court having decided that the operating company was merely a Department of Trinity Church Corporation, neither one ever filed or was asked to file a tax return.

"Q. For the purpose of the record can you state who owned Trinity Operating Company?

"A. All the stock was owned by the corporation of Trinity Church and all of the directors were members of the Vestry of Trinity Church, with the exception of Mr. Stanton.

"Q. With respect to the \$20,000 voted to Mr. Stanton was any portion of that withheld for Federal tax purposes?

"A. No.

"Q. Was any information return filed by Trinity Church or Trinity Operating Company with respect thereto?

"A. Not to my knowledge.

"Q. I show you a letter dated April 17, 1945, on the letterhead of Wise, Sheppard, Houghton & Kelly, addressed to this firm, and ask you whether you signed that letter, Mr. Sheppard?

"A. Yes, sir; that is my signature."

Mr. Lee: I offer it in evidence, as Plaintiffs' Exhibit No. 2.

Mr. Rita: I object to it as a self-serving declaration; also, it is not the best evidence.

The Court: May I see it, please?

[fol. 27] (Handing document up to the Court.)

The Court: Objection overruled.

(A letter, dated April 17, 1945, received in evidence as Plaintiffs' Exhibit No. 2.)

By Mr. Lee:

"Q. I show you another letter dated October 27, 1944, on the same letterhead, and ask you whether you signed that letter?

"A. That is my signature."

Mr. Lee: I offer this in evidence as Plaintiffs' Exhibit No. 3.

Mr. Rita: I object to the exhibit on the ground that it is a self-serving declaration; and not the best evidence.

The Court: May I see it, please?

(Handing document up to the Court.)

The Court: Objection—what is the objection?

Mr. Rita: On the ground that it is a self-serving declaration; and it is not the best evidence.

It is a legal conclusion.

The Court: On whose behalf is the alleged self-serving declaration made?

Mr. Rita: Pardon me, sir?

The Court: On whose behalf do you say there is a self-serving declaration?

Mr. Rita: Mr. Stanton's attorney requested this opinion from Mr. Sheppard.

The Court: Yes; Mr. Sheppard wrote the letter.

Mr. Rita: That is correct.

The Court: What assertion did he make that you say is a self-serving declaration?

He had no interest whatsoever to serve.

Mr. Rita: This is a self-serving declaration on behalf of the moving party.

[fol. 28] The Court: Well, you and I don't understand what self-serving declaration means.

Your objection is overruled.

Mr. Rita: I also object on the ground that it is hearsay.

"The Court: If you wish to examine the writer of that letter, or cross-examine him, I suppose you can subpoena him for that purpose.

We are trying to find out the truth in this case, the nature of the transaction. This seems to be competent evidence of the nature of the transaction, as I understand it.

Now, if you wish to call Mr. Woolsey and cross-examine him, that is your privilege.

(Letter of October 27, 1944, received in evidence as Plaintiffs' Exhibit No. 3.)

By Mr. Lee:

"Q. Mr. Stanton,"—

I am afraid that that is a typographical error. I should have said Mr. Sheppard in the deposition.

"At the time the resolution was adopted voting a gratuity of \$20,000 to Mr. Stanton, was there any reason for Trinity Church Corporation, or Trinity Operating Company, to retain Mr. Stanton's good will?

"A. No.

"Q. Did Mr. Stanton have any voice in voting such gratuity?

"A. No, he did not.

"Q. After Mr. Stanton's resignation, did he render any services to Trinity Church Corporation, or to Trinity Operating Company?

"A. No, I believe he was subpoenaed as a witness in a lawsuit which was brought against Trinity Church some years later, but as I say, he obeyed a subpoena.

"Q. Do you know whether Mr. Stanton was refunded [fol. 29] his pension payment by the corporation of Trinity Church, or Trinity Operating Company?

"A. I was so informed by the treasurer and his successor as controller."

Mr. Rita: I object to that on the ground it is hearsay.

The Court: Yes, but it is not harmful.

Your objection is overruled.

By Mr. Lee:

"Q. Did Mr. Stanton request any payment from Trinity Church after his resignation?

"A. No.

"Q. At the time the resolutions which are set forth in Plaintiffs' Exhibit No. 1, were adopted, were you present at that meeting?

"A. I was.

"Q. What did you have in mind when you voted that?

"A. We were going to make Mr. Stanton—"

Mr. Rita: I object on the ground that the witness is incompetent to testify as to the intention of the board of directors of the operating company.

The Court: Well, I think that he may state what his own intention was.

Mr. Rita: That is true, but he is stating it in the plural.

The Court: I think the objection is really to the answer, rather than to the question.

The answer was, "We were going," which is not indicative of his own frame of mind.

I will sustain the objection.

Now, you say that you rephrased the question.

Mr. Lee: Yes, your Honor, I will skip down to the next question:

"At the time you voted on the resolution, Mr. Shepard, what was your intention?

"A. To give Mr. Stanton—"

[fol. 30] Mr. Rita: I object: it calls for subjective process of the witness' mind.

The Court: Will you tell me how the Court is going to find out if this was a gift or not, if you are going to shut every avenue of inquiry?

The Court has no interest in this controversy. The Court is trying to find out what the facts are.

Here is a man who was on the board, who cast a vote. Why shouldn't the Court be informed as to what he says about it?

Mr. Rita: This is the witness' own feeling in the matter. Whether it is a gift or not, it is up to the Court.

The Court: Of course, and if you are going to try to exclude all evidence that will inform the Court, I don't see how the Court can reach a conclusion.

I think that your objection is futile, it is overruled.

By Mr. Lee:

"At the time you voted on the resolution, Mr. Sheppard, what was your intention?

"A. To give Mr. Stanton a gift.

"Q. At or prior to the vote, did you discuss with the other members of the board of directors in the meeting the proposed action of the board of directors?

"A. Yes, there was a good deal of discussion.

"Q. Were you present?

"A. I was.

"Q. Did you participate in the discussion?

"A. I did.

"Q. Based upon your being present and participating in that discussion, can you state what was the intention of the board of directors?"

Mr. Rita: That is objected to on the ground the witness is incompetent to testify as to the intention of the board of directors.

The Court: Overruled.

By Mr. Lee:

"Q. Can you state what the intent of the board of directors was in adopting such resolution?

[fol. 31] "A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.

"He did a splendid piece of work, we felt.

"Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift?

"A. No question about it."

Mr. Rita: I object to it again.

The Court: Overruled.

By Mr. Lee:

"Q. Can you state when Mr. Stanton first was employed by the corporation of the Trinity Church, or Trinity Operating Company?

"A. I cannot recall the date. I know that when Mr. Stanton first came to the corporation, a man named Crane was the controller—no, Mr. Purdy was the controller.

"Mr. Purdy only devoted a portion of his time to the business of the corporation.

"Mr. Stanton was engaged to handle the real estate of Trinity Church at one of the departments of the whole corporation as distinguished from its religious end. When Mr. Purdy resigned, Mr. Stanton was made controller; but the dates I cannot remember.

"Q. Was that approximately 1933?

"A. I would think about then, yes.

"Q. At that time was the property of Trinity Church heavily encumbered?

"A. Yes, it was.

"Q. When I say heavily, would that be in excess of many millions of dollars?

[fol. 32] "A. Yes, in excess of two or three millions.

"Q. At the time Mr. Stanton resigned, had there been any change in the status of Trinity's temporal affairs?

"A. Yes, the mortgage indebtedness had been somewhat reduced, substantially reduced.

"As to a number of buildings which had been erected on ground leases, the owners had defaulted, and Trinity was obliged to do them over and manage them and try and rent them. They are loft buildings and business buildings of that kind.

"At that time when Mr. Stanton was elected a controller, it was thought best to organize a real estate company which would be wholly owned but which would have charge of the real estate as distinguished from the general finances of the corporation and many of its religious activities.

"Mr. Stanton was voted both as controller and as president of the real estate corporation, and that was the way it was set up.

"Q. On the basis of your knowledge throughout the years, can you say whether Mr. Stanton did a good job with respect to the properties of Trinity Church?

"A. He did a very good job. Our income was substantially increased by his success in finding tenants for the various buildings.

"Q. I ask you to examine the proviso in the letter set forth in Plaintiffs' Exhibit 1, which refers to Mr. Stanton's release of all claims to pension and retirement benefits not already accrued up to November 30, 1942, and ask you whether you know anything about that proviso?

"A. Yes, it was a more or less technical proviso. We felt that when we discontinued the services of a person, we liked to have a general release.

"The only thing for Mr. Stanton to release was any possible claims he might have—we knew he had none. But we [fol. 33] did not know—from past experience—whether some heir of his might come in and raise a question. For that reason we put that in at the request of the Chairman of the Standing Committee.

"Frankly, I felt it did not mean anything."

Mr. Lee: Would the Court care to examine Exhibit No. 1 at this time? (Hanging).

The Court: It seems to me that the paragraph at the foot for signature by Mr. Stanton, was it signed?

Mr. Lee: I frankly do not know, your Honor. This is the original.

There may have been a carbon copy which was signed.

"Q. Is it your opinion that the proviso was surplusage?

"A. Absolutely."

Mr. Rita: I object to it on the ground it calls for a legal conclusion.

The Court: I think the witness' opinion may be of help to the Court.

It is not binding on the Court, I agree.

Overruled.

By Mr. Lee:

"Q. Has Trinity Church been involved in any great amount of litigation?

"A. Yes, we had had an extraordinary amount of litigation involving various heirs, so-called, of various personages claiming to be owners of various portions of Trinity property going back to colonial times, I may say.

"Q. It was necessary to protect Trinity Church legally?

"A. Yes.

"Q. Was it your intention that Mr. Stanton should accrue additional pension benefits on account of such payments?

[fol. 34] "A. No, it had nothing to do with any pension.

"Q. If Mr. Stanton had been paid a salary, would he have accrued pension benefits?

"A. Not unless he continued in the employ of the corporation. When he resigned under the terms of the pension plan, he was only entitled to the return of the money he paid in, or an insurance policy equal to the amount that he paid in.

"At least premiums would have been equal to the amount that he paid in.

"Q. Is it your testimony that the proviso in the resolution, which you say that you put in, was intended to prevent or preclude any claim by any heir of Mr. Stanton's that he was receiving compensation?

"A. Yes, that he might be entitled for some reason or another to something from the pension fund."

Mr. Rita: I object on the ground it calls for a legal conclusion.

The Court: Overruled.

Mr. Lee: Will you read the answer, Mr. Hasler?

"A. Yes, that he might be entitled for some reason or another to something from the pension fund.

"Q. Now, you have testified that Mr. Stanton did a good job for Trinity.

"Now I will repeat the question which was objected to earlier. Was he adequately compensated for what he did, in your estimation?

Mr. Rita: That is objected to on the ground it calls for a conclusion.

The Court: Sustained.

Mr. Hasler: Do I answer, your Honor?

The Court: No, I am sustaining the objection.

Mr. Lee: May I ask the witness now to turn over to page 11 of the deposition at the foot of the page?

The question is:

[fol. 35] "Q. Based upon your knowledge as a director, as a Vestryman, and as counsel, did Alden Stanton give up anything under the proviso of the resolution set forth in Plaintiffs' Exhibit No. 1?

"A. No."

Mr. Rita: That is objected to on the ground it calls for a legal conclusion.

The Court: I think it does. The objection is overruled. I think it may be of help to the Court.

Mr. Lee: Your honor, that is the end of the—

The Court: Direct and redirect?

Mr. Lee: Direct and redirect of the deposition.

If Mr. Rita cares to read the cross—

Mr. Rita: Mr. Hasler, would you turn to page eight, please.

Mr. Hasler: Yes.

Mr. Rita: The middle of the page there.

Mr. Hasler: Yes.

By Mr. Rita:

"Q. Mr. Sheppard, I would like to ask you what pension rights and retirement rights Mr. Stanton had at the time of his resignation?

"A. Well, I would have to refer to the pension plan. But broadly speaking, the pension plan provided that all people who are members of the pension plan, if they had been an employee of the corporation for a minimum of two years, and at that time they paid or contributed a certain portion of their salary to the plan, and the corporation contributed the rest,—it was all paid to the Chase National Bank as trustee—when they reached retirement age of 65 they could then retire and receive a pension.

"I cannot recall the exact percentages which they were to receive, but it was based on the salaries which they had [fol. 36] received over a period of at least five years, broadly speaking.

"Q. Broadly speaking, can you state what it would amount to at a salary of \$22,500?

"A. It would be more or less of a guess, \$10,000.

"Q. How old was Mr. Stanton when he resigned?

"A. I haven't any idea. Much less than the retirement age, in his early fifties.

"Q. You say that the proviso in the resolution provided that with the discontinuance of his services, the corporation of Trinity Church was released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

"Do you say that was a useless provision?

"A. To my mind, it was.

"Q. Why did you put it in?

"A. Because Mr. Hasler who was Chairman of the Standing Committee felt so many claims were made against Trinity involving Trinity in law suits, that we ought to be protected against a claim even though we knew it could not be successfully prosecuted.

"Q. Then the proviso had some use?

"A. If you call that a use, yes.

"Q. Did Mr. Stanton have any children?

"A. Yes, he had a son."

The Court: Do you intend to read—

Mr. Rita: No, your Honor, I am not going to read it all.

The Court: (Continued)—the question on the middle of page nine, respecting the book entries?

Do you intend to read that?

Mr. Rita: I hadn't planned to, your Honor.

The Court: Well, I will read it:

"Mr. Sheppard, I notice in your letter to Mr. Koch,"—I don't know how to pronounce it—"I notice in your letter [fol. 37] to Mr. Koch, in which you say the treasurer informed you, the payments were entered in the books of Trinity Operating Company as a gratuity.

"Were the entries in the corporation of Trinity Church also entered as a gratuity?"

"A. Yes."

Mr. Rita: Mr. Hasler, would you drop down to the bottom of page nine?

"Q. You say that you were general counsel for the church?"

"A. Yes."

"Q. For how many years?"

"A. I still am. The same year that Mr. Stanton was elected controller."

"Q. What year was that?"

"A. 1933, or 1934."

"Q. You say you are a trustee of the pension plan of the corporation of Trinity Church, or is it Trinity Operating Company?"

"A. Both, trustee of both."

"Q. How many trustees were there?"

"A. Three."

"Q. Who were they besides yourself?"

"A. Mr. Stanton and I would have to check."

"Mr. Stanton knows better than I do. Mr. Moore, he is dead now."

"Q. You say Mr. Stanton came to work for the corporation of Trinity Church back in 1933, approximately?"

"A. About then."

"Q. Do you know what his functions were?"

"A. Yes, sir, he was a clerk who had charge of the real estate end of it."

"Q. Do you know what his salary was at that time?"

"A. I have no idea."

[fol. 38] "Q. You say that after Mr. Stanton resigned he contributed no further service to Trinity Church or corporation?"

"A. Well, I think when we would ask him questions as to something that we were not clear about, he would tell us."

"I don't know whether you would consider this service or not."

"Q. You said on direct examination that Mr. Stanton came in as a witness in a case involving Trinity Church

"Can you state what that was about?

"A. It was a suit brought against the rector which was finally settled. It was highly confidential.

"Q. A suit against the rector?

"What was the name of that suit?

"A. I think Watkins against the Rector. I don't know whether the corporation was made a party or not.

"Davis, Polk handled the case, and Theodore Kiendl.

"Q. What was the title of the case?

"A. Watkins.

"Q. Was the church suing Watkins?

"A. Watkins was suing the church.

"Q. You say that was of a confidential nature?

"A. It was against the rector personally.

"Q. You said on direct examination that you did not know whether the pension was refunded to Mr. Stanton.

"A. Not of my own knowledge. I was informed by the treasurer it was. I did not have anything to do with it.

"I would like to add as a trustee I must have voted with the other trustees to refund the money. I don't recall it. It was too long ago.

"Q. As trustee of the pension plan would Mr. Stanton vote on the return of the pension to himself?

[fol. 39] "A. I don't imagine he would. I think it was more or less automatic.

"These were the provisions of the pension plan and he had resigned. The remaining trustees would handle the matter.

"Q. When did Mr. Watkins leave the employ of the church?

"A. 1942—I think 1942."

The Court: What has that got to do with this?

Mr. Rita: Your Honor, it shows a connection, I believe, with Mr. Watkins and Mr. Stanton.

The Court: What do you mean for an income purpose by a connection?

Mr. Rita: Mr. Watkins was brought into the church by Mr. Stanton.

Mr. Watkins was fired in October, 1942.

Mr. Stanton resigned within three weeks thereafter.

I think that it has some bearing on the case.

The Court: Perhaps you can point it out. Maybe I am more infirm, I suspect.

I see no bearing whatever on the question of whether this was a gratuity or a compensation.

Mr. Lee: If I may say, Mr. Watkins received payments from the church as well. He litigated that question in the tax court. He lost his case in the tax court.

We—Just so that the Court will be informed of the background—we believe the tax court in its opinion clearly distinguished between the Court situation here, and Mr. Watkins'.

We will not make any further objection to Mr. Watkins.

The Court: I am not interested. But if counsel wants me to, I am bound to listen.

Mr. Lee: Right, sir.

[fol. 40] Mr. Rita: I believe the last question was:

"Q. When did Mr. Watkins leave the employ of the church?

"A. 1942—I think 1942.

"Q. In the same month as Mr. Stanton left?

"A. No, I think it was before Mr. Stanton resigned.

"Q. You don't know approximately what month?

"A. No, I think a month or so before.

"Q. Did Mr. Watkins resign?

"A. Mr. Watkins was discharged.

"Q. Did that have anything to do with Mr. Stanton's resignation?

"A. Not that I know of; as far as the corporation was concerned, anyhow."

Mr. Rita: That is all I wanted to ask.

Mr. Lee: That completes our submission of the deposition of Mr. Sheppard, your Honor.

The Court: All right.

Mr. Lee: May I call Mr. Hasler now on his own right?

The Court: Now, will you swear Mr. Hasler, please?

FREDERICK E. HASLER, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Hasler, were you a member of the Vestry of Trinity Church in 1942 at the time that Mr. Stanton resigned?

A. Yes.

Q. Were you a member also of the Standing Committee of the Vestry?

[fol. 41] A. I was Chairman of that.

Q. At that time what was your occupation, Mr. Hasler?

A. Chairman of the Continental Bank and Trust Company.

Q. Chairman of the Board of Directors; is that correct?

A. Yes, sir.

Q. Were you present at the time the resolution was adopted, referred to in Plaintiffs' Exhibit No. 1 (handing)?

A. Yes.

Q. Did you vote on such resolution?

A. I did.

Q. Was there any discussion prior to the voting on such resolution?

A. That is too far back—I would say, yes.

Mr. Stanton was held in very high regard by the members of the Vestry and undoubtedly there was discussion before the meeting, yes.

Q. On the basis of your participation in the Vestry meeting, or the Board of Directors' meeting, which adopted such resolution, and on the basis of your vote—

The Court: You are speaking of the vote of the Vestry of the Church, or the Board of Directors of the Corporation?

Mr. Lee: I should clarify that, if your Honor please.

I should have said the Board of Directors of the Trinity Operating Company.

Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the

Board of Directors was at the time of the adoption of that resolution?

[fol. 42] Mr. Rita: I object on the ground that the witness is incompetent to so testify.

The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

Q. Mr. Hasler, this meeting took place in 1942.

Could you possibly recall anything which you or any other member of the Board said at that time?

A. Yes, sir, we were all unanimous in wishing to make Mr. Stanton a gift.

Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

We understood that he was going in business for himself.

We felt that he was entitled to that evidence of good will.

Q. Do you know whether Mr. Stanton had subsequent to the effective date of his resignation—do you know whether he had performed any services for either the corporation of Trinity Church or Trinity Operating Company?

A. Not that I know of.

Q. From the date of Mr. Stanton's resignation, have you been continuously associated with Trinity Church?

A. Yes.

Q. Have you been a vestryman during that period?

A. Yes.

Q. Continuously?

A. Yes. I am now Warden which is distinct from the Vestry.

Q. Are you Junior Warden?

A. Senior.

Q. Prior to Mr. Stanton's resignation, had he been paid in full for all services rendered by him?

[fol. 43] Mr. Rita: I object to that.

The Court: Why?

Mr. Rita: Your Honor, I think that that calls for a legal conclusion.

The Court: Overruled. Of course, he may state whether he was paid for his services.

The Witness: Would you mind repeating the question?

Q. Prior to Mr. Stanton's resignation, had he been paid in full for the services rendered by him?

A. Yes.

Q. After Stanton's resignation had been accepted, and upon the voting on the resolution, did he have any voice in voting on the resolution awarding him \$20,000?

The Court: I think your question is:

Did he participate in the vote?

The Witness: The answer is no.

Q. Do you know of any business purposes which would have been served by obtaining the good will of Mr. Stanton in the business sense of the term?

A. No.

Q. (Continued) Upon his resignation?

Has Trinity Church or Trinity Operating Company, Incorporated, obtained any Federal income tax benefits from the manner in which these payments were treated on its own books?

A. No.

Q. Did Trinity Operating Company or the corporation of Trinity Church withhold any payments to Mr. Stanton for Federal income tax purposes?

A. No.

Q. Did it file any information returns that you know of?

A. Not that I know of.

[fol. 44] Q. Under the terms of the pension plan, as it existed, would compensation or payment for services to Mr. Stanton, require him to make contributions to the plan, if he were a member of it?

A. I understood so, yes.

I was not a trustee of the pension plan, though.

Mr. Lee: No further questions, your Honor.

Cross examination.

By Mr. Rita:

Q. Mr. Hasler, how long have you been associated with the Trinity Operating Company?

A. I became a director when I became a vestryman in '41, I think.

I was a director of the Operating Company until it was dissolved.

Q. When was the operating company dissolved?

A. I can't remember the year now.

Q. Were you familiar with the transactions which occurred during the year 1942, in connection with leaving of the church by Mr. Stanton, Mr. Watkins, and Miss Meade?

A. Would you mind repeating that?

Q. Surely.

I say, were you familiar—

The Court: Just a moment, he will read it.

(The question was read by the reporter.)

The Court: How do you spell that?

The Witness: M-E-A-D-E.

I would like to ask the counsel just what do you mean by "transactions"?

Q. Well, now, the leaving of the church, are you familiar with the background?

[fol. 45] A. As a director of the operating company and vestryman, yes, I would know anything of importance.

Q. I would like to show you Government's Exhibit No. A for identification, which is a copy of the special meeting of the board of directors.

The Court: Do you mean minutes?

Mr. Rita: Minutes of the board of directors of the Trinity Operating Company, of October 14, 1942.

Q. Are you familiar with that, sir?

A. Yes.

Q. You were present at that meeting?

A. I was present.

Mr. Rita: May I have that back, please?

The Witness: (Handing).

Q. It was at that time, was it not, that the question of the discharge of Mr. Watkins came up; is that right?

A. Yes.

Q. Can you tell us why it was that Mr. Watkins was being discharged?

A. To the best of my recollection, it was due to the personality of Mr. Watkins.

A. There was no other reason involving here, his integrity in any way.

Mr. Lee: If the Court please, I would like to object to any further questions concerning Mr. Watkins.

I don't think that it has any relevancy.

The Court: I will be glad to have the Government explain to me what possible light that would throw on the nature of the grant made to this taxpayer.

Mr. Rita: Very well, your Honor.

Mr. Watkins was brought into the employ of the Trinity Operating Company, where he served as treasurer.

The Court: What?

[fol. 46] Mr. Rita: He served as treasurer for some four and a half years.

The Court: Of the operating company?

Mr. Rita: That is correct.

Now, in 1942, Mr. Watkins was discharged for reasons of failing to get along with the tenants, and as I understand it from being charged with dishonesty.

Now, Mr. Watkins, I said, was brought in by Mr. Stanton. When this meeting of October 14th came about, wherein the board of directors resolved to discharge Mr. Watkins, Mr. Stanton opposed this move vigorously.

He took action to expunge the action of the board at that meeting.

He employed the advice of counsel.

The Court: He took action to expunge?

Mr. Rita: That is right.

The Court: What do you mean by that?

Mr. Rita: He suggested the meeting or the minutes of that meeting be expunged.

The Court: And did he succeed?

Mr. Rita: No, he did not.

The Court: He attempted to have it, he didn't take action, he attempted?

Mr. Rita: That is correct.

The Court: Next? Therefore what?

Mr. Rita: Therefore he incurred the resentment of the board of directors at that time.

The Court: Can you imagine people differing without having resentment or is that beyond the capacity of the United States Government representative to understand those things?

Mr. Rita: I merely say—

The Court: All right, next, what is your next reason?

Mr. Rita: Well, the next reason is that he submitted his resignation—

[fol. 47] The Court: You are speaking of Watkins?

Mr. Rita: No, I am speaking of Stanton.

Stanton submitted his resignation within three weeks of the action of the board.

The Court: Therefore what?

Mr. Rita: Therefore I submit that he did not resign under pleasant circumstances as suggested by counsel.

The Court: Therefore what?

Mr. Rita: Therefore, I am suggesting that he is going out under the same circumstances as Watkins went out.

The Court: All right, is that the length and breadth of your argument?

Mr. Rita: That is part of my argument.

The Court: What else is there to it?

Mr. Rita: Well, your Honor, as counsel pointed out previously, Watkins got a payment under a similar provision, almost identical provision.

Mr. Lee: If the Court please, I can't—

The Court: Now, never mind, I asked him what his theory is, and I am trying to find out what it is.

Mr. Rita: Watkins received a severance payment, and under a—

The Court: And you think that there was a severance payment?

Mr. Rita: That is right.

The Court: Next?

Mr. Rita: Received a severance payment.

The Court: Next; what is the next part of your theory?

Mr. Rita: The measure—

The Court: Because Watkins received a severance payment, therefore, Stanton did, is that it?

Mr. Rita: No, I am trying to point out in the Watkins case this was treated by the Tax Court of the United States as being compensation.

Now, I am pointing—I am trying to point out that if Stanton was separated under similar circumstances, the [fol. 48] distinction upon which counsel relies so heavily, would be knocked out, of the case, so to speak.

The Court: I would say, however, in order to develop your theory, is it necessary to go into Watkins' aspects of the matter?

Mr. Rita: I don't think that it will take too long, but I do want to show the similarity.

The Court: Between what?

Between the actions?

If you can show a similarity between the actions as regarded in the minutes, you are on perfectly firm ground.

Mr. Rita: That is right.

The Court: Go right ahead.

Mr. Rita: All right, sir.

Would you please repeat the last question before the colloquy?

The Court: You were referring to the fact that you said that Stanton took action to have reference to Watkins expunged, and he was unsuccessful.

Go on from there.

Q. At the meeting of October 14th, I believe the board took action to have Mr. Watkins discharged; correct?

A. Yes, sir.

Q. I would like to show you a copy of the minutes, the photostatic copy of the minutes of the Board of Directors of the Trinity Operating Company, dated October 28, 1942, marked Government's Exhibit B for identification.

If you please, look at that, sir (handing).

That is a meeting in which you participated in, sir?

A. Yes.

Q. Do you recall any statement made by Mr.—

Mr. Lee: May I see the proposed exhibit?

[fol. 49] Mr. Rita: I am sorry.

May I have it back, please?

The Witness: May I look through it first?

Mr. Rita: Yes, you better look through it first.

The Witness: Your Honor, this is a full meeting. I would take a long time to read the minutes.

The Court: Is there anything you want to call to his attention?

Mr. Rita: I want to bring out Mr. Stanton's remarks about the action taken at the board meeting of October 14, 1942.

Q. Can you tell us what Mr. Stanton said at that meeting?

A. No, it is too far back, but the minutes speak for themselves.

Q. Could you refresh your recollection there, sir?

A. If you wish me to read the minutes—

Q. Just glance at the page marked with the red marker, there, I believe you will find it,—about the middle of the page.

A. As the president stated—it is all down the line here. Which one do you want?

"The president states he would like to give the directors his reaction to the request made at the meeting of October 14.

"He stated that the action was taken without his previous knowledge.

"And it had been a complete surprise to him. That he had since acted under advice of counsel in the matter.

"He states further that such precipitous action would disorganize and disrupt the activity now being carried on. [fol. 50] "Second, that it would be impossible for the others to properly handle the affairs of the company.

"Third, he considered it unwise and unfavorable to have the treasurer—to peremptorily dismiss him without stating

a reasonable cause after four years and eight months of what he termed remarkable service to the company.

"Four, and without an opportunity to substitute and train new employees, serious financial losses would be sustained."

Do you wish me to go on further?

Mr. Rita: Yes.

The Witness: "In support thereof the president offered evidence to show that the treasurer was held in high taste by the Jennings, and that our labor relations was said to be the finest in this city.

"He stated further that while the treasurer made plans for re-entry into the service, he felt that the effect of this action would be such as to prevent passing the necessary physical tests at that time.

"He stated further that the treasurer had no desire to remain in the employ of this company indefinitely, and that as president he could bring about the change as desired on a mutually agreeable basis if given a reasonable time to work it out.

"The president then recommended that the record of the action taken at the meeting of October 14, be expunged, and that the matter be taken up on the basis of sufficient time being given to re-organize the stock, in order to avoid undue embarrassment either to the company or to the treasurer.

"The question as to the time required was asked and at the time the president stated that while the uncompleted transactions might take until April, it was quite possible [fol. 51] that the treasurer would have rejoined the service prior to that time.

"The matter was discussed at length and resentment was expressed as to the presumptuous suggestion that the action of the board taken after long deliberation should be expunged."

Mr. Rita: That is enough, I think, sir.

The Court: Does that refresh your recollection as to something or other?

You have read from a document, not in evidence, I suppose you realize that?

Now, the question is: Having read that, is your memory refreshed on a given subject?

What subject do you wish to have him speak about?

Q. Do you recall that, sir?

A. In a general way, I do, yes.

Q. Mr. Stanton was—shall we say—hostile?

Mr. Lee: I object, your Honor.

The Court: Well—

The Witness: No, I will answer his question.

No, Mr. Stanton was never at any time hostile.

He, as president and officer in charge of the operating company naturally was expected to express his opinion.

And as the minutes stated, he did so.

The Court: Next question, please.

Mr. Lee: If Honor please, unless the Court would like for me to—

I would make no objection to this proceeding.

I see no point in any of this line of questioning.

The Court: I have no wish in the matter at all.

Are you offering Exhibits A and B for identification?

Mr. Rita: I offer Exhibit A and B at this time in evidence.

The Court: I understand there is no objection.

[fol. 52] Mr. Lee: I understand there is no objection.

Mr. Lee: No objection.

(The minutes of the meeting of the board of directors of Trinity Operating Company were received in evidence at Exhibit A.)

(The minutes of the meeting of the board of directors of Trinity Operating Company were received in evidence as Exhibit B.)

Q. Mr. Hasler, I show you Government's Exhibit C for identification, which are the minutes of the Trinity Operating Company, of October 30, 1942, and ask you to identify that, sir (handing)?

A. Yes.

Q. Were you present at that meeting?

A. I was, yes.

Q. Is that the meeting that Mr. Stanton tendered his resignation?

Mr. Lee: Your Honor, I will stipulate to any minutes that Mr. Rita would like to introduce, or may be introduced, without the necessity of identifying them.

Mr. Rita: May I have that exhibit back, Mr. Hasler?

The Witness: Yes (handing).

The Court: No objection?

Mr. Lee: No objection.

Mr. Rita: I should like to offer in evidence, pursuant to the stipulation of counsel, as Government's Exhibit C, the minutes of the Trinity Operating Company, dated October 30, 1942.

The Court: Exhibit C.

(Defendant's Exhibit C in evidence, additional minutes.)

[fol. 53] Mr. Rita: I would like to offer Exhibit D, the minutes of the Trinity Operating Company, dated November 5, 1942.

(Defendant's Exhibit D in evidence, additional minutes.)

Mr. Rita: I offer in evidence, Government's Exhibit E, which is a copy of the minutes of Trinity Operating Company of November 19, 1942.

(Defendant's Exhibit E in evidence, additional minutes.)

Mr. Rita: Government's Exhibit F, which is a copy of the minutes, of the Trinity Operating Company, dated November 23, 1942, offered in evidence.

(Defendant's Exhibit F in evidence, additional minutes.)

Mr. Rita: I offer as Government's Exhibit G, the minutes of the Trinity Operating Company, dated December 28, 1942.

Mr. Lee: No objection.

(Defendant's Exhibit G in evidence, additional minutes.)

Mr. Rita: The last, I offer Government's Exhibit H, which is a copy of the minutes of the Trinity Operating Company, January 8, 1943.

Mr. Lee: No objection.

The Court: Is there any reference to the action taken with regard to the taxpayer Stanton in any of those minutes?

Mr. Rita: Yes.

The Court: Anything to contradict what thus far has been shown as to the nature of it?

Mr. Rita: I think it shows the similarity between the resolutions. It gives a fuller picture, your Honor, of what [fol. 54] transpired as to the month of October and November of 1942.

The Court: I will try again.

I want to ask a clear question.

Mr. Rita: Yes.

The Court: Is there anything in any of the minutes that you offered in evidence that tends to show that the nature of the grant which was made to Stanton was other than has been heretofore stated?

Mr. Rita: I think so.

The Court: You do?

Mr. Rita: Yes.

The Court: Just read it to me, please, into the record.

Just the part that you say contradicts or is inconsistent with what has already been shown concerning the Stanton grant.

Mr. Rita: Your Honor, I will read from Government's Exhibit D, second page:

"Resolved to accept the resignation of the president and his secretary as of November 30, 1942, and that a committee be appointed to consider compensation to Mr. Stanton and Miss Meade in appreciation of their past services."

I think that that is sufficient to show that is certainly not thought of in the terms of a gift.

The Court: Well, at that time, certainly, that would be consistent with a plan having in view compensation.

What happened to that committee's deliberations?

How were their deliberations put into final form?

Mr. Rita: Their deliberations were put into final form by attachment of the proviso.

The Court: By the what?

Mr. Rita: Attachment of the proviso at the end of the resolution.

[fol. 55] In other words, in consideration of the waiver I think that is consistent, your Honor.

The Court: Now, that, of course, is separate from your theory that the way that Watkins was treated, throws light on the way that Stanton was treated.

Mr. Rita: That is true.

The Court: Those are two separate ideas.

Go ahead.

Mr. Lee: May we have for the record the date of what Mr. Rita just read?

Mr. Rita: Exhibit D, November 5th.

The Court: 11/5/42.

Mr. Rita: That is correct.

The Court: What was the date of the adoption of the resolution that had to do with Stanton?

The Witness: October 28th.

Mr. Rita: October 30th, '42, Stanton's resignation.

Mr. Lee: The resolution.

Mr. Rita: November 19, 1942.

The Court: That is two weeks after November 5th.

Did you ever hear of people changing their minds in a period of two weeks?

Mr. Rita: That is part of the statement, your Honor.

The Court: All right, go ahead.

Q. Mr. Hasler, you are familiar with the operations of the Trinity Operating Company with respect to people leaving its service, is that correct?

A. The Trinity Operating Company doesn't exist now.

Q. I know, but in those years?

A. While I was a director, I would know of important changes in the personnel. But of the minor ones, no.

Mr. Rita: Where is Plaintiffs' Exhibit No. 1?

The Court: Exhibit 1 is the letter, Stanton to Belnap, isn't it?

[fol. 56] Mr. Rita: The resolution letter, I believe.

The Witness: It is a letter from Belnap, sir.

Q. Mr. Hasler, at the bottom of that resolution it says provided that Stanton releases all the pension rights; is that right?

Mr. Lee: I object to that, your Honor; that is a most unfortunate phrasing.

The Court: Well, if I hadn't seen it, I might be misled. I read the paper. I called attention to it a few minutes ago, the fact that the paragraph at the foot is not signed. What is your question, please?

Q. I am asking you, is that a usual provision attached to any person leaving the church?

A. So far as I know, I can't remember any similar case.

Q. How about Harris Watkins?

A. Watkins is entirely different.

Q. But he had a similar provision, isn't that correct?

A. I can't answer that. The resignation of Mr. Stanton was entirely different from the reasons that we asked the resignation of Mr. Watkins.

Q. Mr. Stanton was a special case, is that right?

A. Mr. Stanton was a special case.

He had thought for several months before his resignation, of going into business for himself.

While he did object to our asking for the resignation of Mr. Watkins, which he had a perfect right to do, and we respected his opinion, it has had nothing whatever to do with what we did for Watkins, and what we did in making Mr. Stanton a gift.

Q. Did you testify at the Tax Court trial of Mr. Watkins, by any chance?

[fol. 57] A. No.

Q. You did not?

A. Mr. Watkins was not a gift, it was a severance allowance, if my memory is correct.

Am I right?

Q. I believe the contention was that it was a gift.

Mr. Lee: If the Court please, I object to characterizing a lawsuit to a witness in the form of a question.

The Court: It is not a convincing way of proving anything, I suppose you know that.

Please continue with your cross-examination.

Mr. Rita: Yes, sir.

I have nothing further of this witness.

Mr. Lee: I have one question.

Redirect examination.

By Mr. Lee:

Q. Mr. Hasler, was the \$20,000 paid to Mr. Stanton paid pursuant to the resolution, a copy of which is set forth in Plaintiffs' Exhibit No. 1?

A. Yes.

Q. Was that resolution ever rescinded?

A. No.

Mr. Lee: No further questions.

Mr. Rita: No further questions.

I call on Mr. Stanton.

ALLEN D. STANTON, a plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lee:

Q. Mr. Stanton, are you the plaintiff in this action?

A. I am.

[fol. 58] Q. I show you a letter dated December 31, 1942, and ask you whether you received that letter (handing)?

A. I did.

The Court: December 31, '42?

Mr. Lee: Yes, your Honor.

Q. Who it is signed by, if you know?

A. Signed by A. Elliott Bates, acting controller of Trinity Church.

Mr. Lee: I offer it in evidence as Plaintiffs' Exhibit 4.

Mr. Rita: No objection.

(Letter of December 31, 1942, received in evidence as Plaintiffs' Exhibit 4.)

Q. Plaintiffs' Exhibit No. 4, states that under the Trinity Parish Retirement Plan, you had contributed \$1,590.

Did you receive that back from the retirement plan?

A. I did.

Q. It states further that you had contributed \$594.37 to the Trinity Operating Company Retirement Plan.

The Court: How much was that, please?

Mr. Lee: \$594.37, your Honor.

Q. Did you receive that back?

A. I did.

Q. Did you receive anything from either of the two retirement plans, except or in addition to the contributions which you had made?

A. No.

Q. I show you a letter dated January 22, 1943, and ask you whether you received the letter and recognized the signature? (Handing).

A. I received it, and I recognize the signature is that of Admiral Belnap.

[fol. 59] Mr. Lee: I offer it in evidence as Plaintiffs' Exhibit No. 5.

Mr. Rita: I object to it, as hearsay.

The Court: Let me see it, please.

(Handing document up to the Court.)

The Court: Of course, I don't know what this means, and why it is deemed to be relevant.

Mr. Lee: We are offering it, your Honor, to show the way the corporation viewed the payment at approximately the time it was made which bears—

The Court: With Admiral Belnap speaking for the corporation, or was that an expression of his view?

Mr. Lee: Well, perhaps I better ask the witness.

Q. What was Admiral Belnap's position at that time, January 21, 1943?

A. Well, Admiral Belnap succeeded me as the president of the operating company, and I think as acting controller pending the election of another controller.

I can't state exactly which of the positions he held at that date, that being a month and a half or so later.

Mr. Lee: It might obviate my adversary's objection if I limit the purpose of this offering merely to show Trinity Church had been advised by counsel that it was to be treated as a gift, and not Admiral Belnap's opinion at all.

The Court: With that limitation, do you withdraw your objection?

Mr. Rita: Your Honor, it seems to be hearsay to me.

The Court: I will sustain the objection.

I don't think that it tends to resolve any of the issues in the case, if there are any.

Q. Mr. Stanton, at the time that your resignation became effective, did Trinity Church or Trinity Operating Company owe you any money?

A. No.

[fol. 60] Mr. Rita: I object to it, it calls for conclusion.

The Court: Overruled.

Q. Did you participate in any manner in the voting of this amount of money to you?

A. None whatsoever.

Q. Were you physically present when it was voted?

A. No.

Q. Subsequent to the effective date of your resignation, did you perform any services on behalf of the corporation of Trinity Church or on behalf of any of its subsidiary corporations?

A. I think that I appeared once as a witness in a lawsuit. I don't remember just what it was. It was a lawsuit.

The Court: Well, that might or might not be a service to the corporation.

Did you render any services other than to obey a subpoena.

The Witness: I was subpoenaed—no, and that is the only service, if any, that I ever rendered after that—after my resignation became effective, that is what I mean.

Q. Prior to the time of the adoption of the resolution in question, did you know that the resolution was to have been presented?

A. I hadn't heard anything about it. I was completely surprised by it.

Q. Upon your finding out the resolution had been adopted, did you consider the payment to be a gift?

A. I did.

Mr. Rita: I object to that as a conclusion.

The Court: Is that relevant?

Mr. Lee: I believe it is, your Honor.

[fol. 61] The Court: It shows that he treated it as a gift by failing to report it in his income?

Mr. Lee: No, your Honor, under the cases cited in—

The Court: Are there cases on it?

All right; I will allow him to say how he considered it.

The Witness: I answered it, my answer was that I did.

The Court: You did consider it a gift?

The Witness: I did.

Q. Were you discharged from your position with Trinity Church or Trinity Operating Company?

A. I was not.

Q. Did you resign?

A. I did.

Q. Was any pressure put upon you to resign?

A. None whatsoever.

Mr. Lee: If the Court please—it may save some time if it satisfies Mr. Rita—our motion for summary judgment; Mr. Stanton's affidavit, if that could be deemed as direct testimony, I will turn him over to cross-examination.

If it be deemed to be copied into the record, I will let the Government cross-examine.

The Court: You will have to ask him. I can't answer the question.

Mr. Lee: If you will stipulate the affidavit of Mr. Stanton submitted before the motion for summary judgment be copied into the record as the remaining direct testimony, then you may cross-examine.

Mr. Rita: If you would like to read it, read it, but I object.

Mr. Lee: This testimony will be repetitive of what we have already in the record.

I feel that it might come from the plaintiff as well.

This is a denial of our motion for summary judgment. [fol. 62] Judge Abruzzo thought we should put the witness on the stand.

The Court: If there is anything in the affidavit that you have not covered on the witness' direct examination, then why don't you go right to that without reference to the affidavit?

Q. Were you paid \$20,000 by Trinity Church and Trinity Operating Company subsequent to the effective date of your resignation?

A. I was.

Q. What was your position with Trinity Church and Trinity Operating Company.

The Court: When?

Q. At the effective date of your resignation?

A. I was controller of Trinity Church, and president of the Trinity Operating Company.

Q. Were you ever a vestryman or a warden of Trinity Church?

A. I was not.

Q. During your employment by Trinity Church, what in general were your functions?

A. Well, my functions in the church itself, were, as you might say, treasurer.

I had charge of all the financial transactions, the responsibility for all moneys, and properties.

I was the only one in the institution who could sign a check for anything.

Q. Well, in general, did you have anything to do with the real estate owned by Trinity Church?

A. All real estate was under my charge. The physical upkeep of the church building was in my charge.

But the principal business was to earn money to support the church from its income from real estate.

The Court: The title of your office in the church was controller?

[fol. 63] The Witness: Controller.

Q. What was your salary in 1942?

A. At the time I resigned, I was receiving \$22,500 a year.

But between the two, I have forgotten how it was split. It added up to that.

Q. Was such a salary paid to you in full through the effective date of your resignation?

A. It was.

Q. Did the Vestry or the Board of Directors know of your resignation prior to your submitting it?

A. Not until I presented it at the meeting.

Q. Did you ask for anything in return for your resignation?

A. Nothing.

Q. Did you receive anything in return for your resignation?

A. Nothing.

Mr. Rita: I object to the last question.

The Court: Overruled.

Q. Subsequent to the effective date of your resignation, was there any restriction whatever on any business activity which you might conduct?

A. None whatever.

Q. Did you in fact do anything or refrain from doing anything by reason of your former employment with Trinity Church?

A. No.

Q. At the time that you filed your tax return for the years 1942 and '43, did you include the \$20,000 paid to you in your gross income as compensation?

A. I included \$2,000 in the report for 1942, and \$18,000 in the report for 1943 because it was split up for the two years.

Q. But did you call it income?

[fol. 64] A. I included it as a gift.

The Court: You reported it as a gift?

The Witness: I reported it as a gift.

Mr. Lee: No further questions.

Cross examination.

By Mr. Rita:

Q. Mr. Stanton, there has been some testimony about this letter of December 29th, Plaintiffs' Exhibit No. 1, in which there is a phrase at the bottom of the resolution, whereby you waived certain rights; is that correct?

A. Yes.

Q. You signed that letter; is that right, sir?

A. I signed a letter.

The Court: I think the paragraph speaks for itself.

Mr. Rita: Your Honor, it is not signed.

The Court: I understand that, but you talk about waiving rights.

I have read the paragraph. I think it speaks for itself.

Mr. Rita: All right.

The Court: Are you going to ask the witness whether he signed that paragraph or any copy of the letter?

Q. Did you sign that letter, sir?

A. I am sure that I signed a letter with that in it.

Q. Do you remember when you signed the letter?

A. I don't know whether it was in December or January.

It was after I severed my connections, I remember.

It is pretty far back.

Q. Do you recall that the letter was dated December 29th?

[fol. 65] A. As of approximately that date; I think that is when they started paying me.

I think that I signed it, and sent back a letter of acknowledgment. I don't know—I would say it was within a matter of days of the date of the letter.

Q. In other words, you sent it back and then you got payment; is that right?

A. Whether I got the payment with it or after, I do not know.

Q. Do you know when the first payment started?

A. I think the end of December, they paid me for the first time. That is for the month of December, paid me at the end, somewhere, I don't know what date, maybe the 30th or the 29th. I don't recall.

Q. Mr. Stanton, how well did you know Mr. Watkins?

A. How long?

Q. How long?

A. Very well.

Q. Did you bring him into the firm?

A. In a sense, yes.

Q. The corporation?

The Court: There isn't any firm involved here.

You are a lawyer, and you are supposed to be precise.

Do you mind?

Did you bring him into the employ of either corporation?

The Witness: I employed him as a treasurer of the Trinity Operating Company.

Q. Will you tell the Court, in your own words, the background of Mr. Watkins' dismissal from the corporation?

A. I think that that is in the record. The dismissal was brought about at a meeting of, which I had been given no notice.

[fol. 66] But inasmuch as the entire membership of the committee was there, it was a legal meeting. As I remember it, they just transacted one piece of business. They adopted a resolution requesting me to dismiss him.

Q. What action did you take thereafter, sir?

A. I sought advice of counsel, and got it.

I didn't do anything about it because I was in a position where I had a responsibility to try, which I didn't feel that I could carry out if I lost Watkins' services suddenly.

Q. Why did you seek the advice of counsel?

Mr. Lee: I object, your Honor. I think this is wholly beside the point.

The Court: I can't think of anything further beside the point, but you know the attitude of the United States when it sees a penny of income taxes that it could grasp.

Now, just let him alone.

Mr. Lee: All right.

The Witness: May I complete the answer?

Q. If you please.

A. Well, I had the entire responsibility for what was going on. I was in some very critical negotiations.

I asked counsel whether I was justified in employing Watkins to complete the negotiations he had started. For instance, he was carrying on a very important negotiation in Washington.

The Court: You received advice?

The Witness: I received advice that I not only had the right to do it, but I had the duty to do it, to hire and use anybody that I thought was necessary to carry on, so I did.

I went on and for a couple of weeks I used Mr. Watkins in a rush situation.

[fol. 67] Q. When did you resign from this corporation, when did you decide to resign from this corporation?

A. I don't remember.

Q. Shortly thereafter, was it?

A. I did resign shortly thereafter, but not—I should say when I decided that I would resign, I think I decided long before that, that I would resign.

Q. You took Mr. Watkins' side in this dispute?

A. I took Trinity's side in it.

Q. Could you tell us why you desired to have the minutes expunged of the minutes of the meeting of October 14th.

A. For the reasons stated in those minutes.

Q. You were a witness at the tax court trial of Mr. Watkins?

A. I was there. I don't remember whether I testified or not.

Q. Mr. Stanton, after leaving the employ of Trinity Operating Company, and the Trinity Church, what did you do then?

A. Well, temporarily I occupied an office in the building downtown. I forget what it was, Pine Street, I guess; and sat about deciding what I would do.

I think that it was two or three months later that a group of us bought a war plant, a machine shop or machine tool business, and carried that out throughout the war—subsequently dissolved it.

Q. After you dissolved it, what business did you take up?

A. Well, I have dabbled in real estate since, I have not been exactly as active as I used to be.

I am not as young as I used to be.

My interests are in real estate—continued to be. I am becoming more active now than I had for some time.

[fol. 68] Q. Mr. Stanton, after leaving the employ of the church, did you ever furnish any advice to the corporation?

A. I don't remember as having done so. We may have been asked questions, but I don't think that it was anything serious.

Q. Were you ever impleaded in any court action?

A. I believe I was. I think that I was impleaded as a co-defendant in a case that was brought against the Rector.

Q. What was the nature of that?

A. I don't know. I just went there. I never knew what the case against the Rector was, except that this man, Major Watkins, had brought suit against the Rector for certain commissions.

I didn't stay. I wasn't present at the trial. They decided that they would not use me at all.

Q. Did you have a secretary at the corporation named Florence D. Meade?

A. Yes, sir.

Q. Was she employed there as long as you were?

A. No.

Q. She was not?

A. No.

Q. Did she leave under the same conditions as you did?

A. She resigned when I resigned.

Q. She did?

A. Yes.

Q. Did she receive the same type of payment from the corporation?

A. Well, the resolution was worded—

The Court: Just a minute, please.

The Witness: I beg your pardon?

[fol. 69] The Court: Well, one of the debatable questions is whether the use of the word "payment" is correct.

I think that your question is, was there a resolution adopted by the board of either corporation or a gift or

a payment, by either corporation, similar to the one that affected you, as to her?

I don't know what it has to do with this case, but if you ask the question, I will ask for an answer.

Mr. Rita: I withdraw that question.

No further questions.

Mr. Lee: If Mr. Rita will stipulate the only question before this Court is the nature of the payment, then we will rest, your Honor.

The Court: Well, I thought that that was agreed to at the outset.

Mr. Lee: That is my understanding. I just want to make certain that I understood that it is entirely correct.

Mr. Rita: That was understood at the beginning.

Mr. Lee: Very well, the plaintiff rests.

Mr. Rita: Defendant rests.

The Court: At the conclusion of the taking of testimony in this case, the Court makes the following finding of fact:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen D. Stanton, in the amount of \$20,000 payable to him in monthly installments of \$2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943.

Does that cover the case?

Mr. Lee: It does, your Honor.

The Court: If additional findings are needed, settle.

Mr. Lee: Thank you, your Honor.

The Court: Of course, you will submit a judgment embodying the results of the findings.

Mr. Lee: Yes.

The Court: And that also is to be settled.

[fol. 71]

IN UNITED STATES DISTRICT COURT

JUDGMENT—November 5, 1958

The Court having considered the evidence and the arguments of counsel and having entered its findings of fact and conclusions of law herein, it is in conformity therewith:

Ordered that the plaintiffs have judgment against the defendant for the principal sum of Fifteen Thousand Fifty-Six Dollars and Twenty-Nine Cents (\$15,056.29) with interest thereon at six per cent according to law.

Mortimer W. Byers, United States District Judge.

Dated: Brooklyn, N. Y. November 5, 1958.

[fol. 72]

EXHIBIT 1

[Letterhead omitted]

December 29, 1942

Mr. Alden D. Stanton, Late President,
Trinity Operating Company, Inc.
1 Cedar Street,
New York, N. Y.

MY DEAR MR. STANTON:

I take pleasure in communicating to you the following resolution recorded in the minutes of the meeting of Trinity Operating Company, Inc. of November 19, 1942:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate

and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 73] May I ask that you indicate your acceptance on the terms stated in the resolution by signing the release written below in a duplicate of this letter.

With kind regards and best wishes, I remain,

Sincerely yours,

TRINITY OPERATING COMPANY, INC.

REGINALD R. BELKNAP,

President.

RRB/n
Encl.

NEW YORK, N. Y. December 29, 1942

I hereby accept the specified sum of \$20,000.00 to be paid in equal monthly instalments of \$2,000.00 each for a period of ten months beginning December 1, 1942 and hereby give full and final release from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 74]

EXHIBIT A

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held at the office of the Rector of Trinity Church, #74 Trinity Place, in the City of New York on October 14, 1942 at 4:40 P. M.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Hasler, Booth, Bayne and Outerbridge, constituting the entire directorate, and Mr. Shepard of counsel.

The President acted as Chairman of the meeting and also as Secretary. All of the Directors verbally waived notice of the meeting and the President was requested to prepare a written Waiver of Notice of the Meeting, which when signed shall be filed with the minutes of this meeting.

Upon motion of Mr. Booth, seconded by Mr. Davies, and unanimously carried, it was

RESOLVED that the President be asked to terminate the employment of Mr. Harris W. Watkins as Treasurer by resignation or otherwise forthwith, and that the question of severance pay be left to the President and Mr. Hasler for determination with power.

There being no further business, upon motion duly made, seconded and carried, the meeting adjourned.

s/ ALDEN D. STANTON,
Secretary pro tem.

[fol. 75]

EXHIBIT B

MINUTES OF MEETING OF BOARD OF DIRECTORS OF TRINITY
OPERATING COMPANY, INC.

A special meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President at 74 Trinity Place, in the City of New York, at 3:30 P.M. on October 28, 1942.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Hasler, Booth, Bayne and Outerbridge, constituting the entire directorate, the Secretary and Mr. Shepard of Counsel.

The President read the minutes of the meeting of October 14, 1942, and

Upon motion duly made, seconded, and unanimously carried, it was

RESOLVED to approve the minutes of the meeting of October 14, 1942 as read.

The President then stated that he would like to give the Directors his reaction to the request made at the meeting of October 14th. He stated that the action was taken without his previous knowledge, and had been a complete surprise to him; that he had since acted under advice of Counsel in the matter.

He stated first, that such precipitate action would disorganize and disrupt the activities now being carried on; second, that it would be impossible for the two other executives to properly handle the affairs of the company; third, that he considered it unwise and unfair to the Treasurer [fol. 76] to peremptorily dismiss him without stating a reasonable cause after four years and eight months of what he termed remarkable service to the company; fourth, that without an opportunity to substitute and train new employees, serious financial losses would be sustained.

In support thereof, the President offered evidence to show that the Treasurer was held in high esteem by tenants and that our labor relations were said by the Union to be the finest in this city. He stated further, that, while the Treasurer had made plans for re-entry into the Service, he felt that the effect of this action would be such as to prevent his passing the necessary physical tests at this time.

He stated further that the Treasurer had no desire to remain in the employ of this company indefinitely and that, as President, he could bring about the change desired on a mutually agreeable basis if given a reasonable — to work it out.

The President then recommended that the record of action taken at the meeting of October 14th be expunged, and that the matter be taken up on the basis of sufficient time being given to reorganize the staff, in order to avoid undue embarrassment either to the Company or to the Treasurer.

The question as to the time required was asked and the President stated that, while the uncompleted transactions might take until April, it was quite possible that the Treasurer would have rejoined the Service prior to that time.

The matter was discussed at length and resentment was expressed as to the "presumptuous" suggestion that the action of the Board, taken after long deliberation, should be changed.

Mr. Hasler stated that he had discussed with the President the question of severance pay, but that he had suggested no basis, and the President stated that if the Treasurer had committed any act warranting immediate dismissal, no question of severance pay would be involved.

The President was directed to proceed with the carrying out of the resolution adopted at the meeting of October 14, 1942 to terminate the employment of the Treasurer. The Treasurer was to be given an opportunity to resign if he desired to do so.

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s/ FLORENCE D. MEAD,
Secretary.

[fol. 78]

EXHIBIT C

WAIVER OF NOTICE OF MEETING OF DIRECTORS

MINUTES OF THE MEETING OF BOARD OF DIRECTORS

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President, 74 Trinity Place, in the City of New York, at 4 P. M. on October 30, 1942.

Present: The President, Messrs. Stickney, Belknap, Davies, Davis, Booth and Bayne; the Secretary and Mr. Shepard of Counsel. Mr. Outerbridge had asked to be excused.

The President acted as Chairman of the meeting and the Secretary of the Company acted as secretary.

Proof of Notice was presented by the Secretary.

A Waiver of Notice of the meeting was signed by all members present.

The minutes of the meeting of October 28, 1942 were presented, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to dispense with the reading of the Minutes of the Special Meeting of the Board of Directors held on October 28th, 1942.

The President stated that he had advised the Treasurer of the suggestion of the Board, made at its meeting of October 28th, and had outlined to him the proposal that he resign as of October 31st, and further that his salary would continue for six months beginning November 1st.

The President then stated that the Treasurer had refused to resign as of October 31st, 1942.

[fol. 79] The President asked if the suggestion to pay salary for six months period was contingent upon the Treasurer's resigning and stated that he would like to have

instructions as to what, if anything, should be paid after the Treasurer's dismissal on October 31st.

After a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the President ~~be authorized to pay~~ to Mr. Harris W. Watkins, monthly, an amount equal to his salary for a period of six months beginning November 1, 1942, in appreciation of his past services; provided that, with the discontinuance of his services the Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31st, 1942.

(See correction minutes of meeting of Dec. 28, 1942.)

The President stated that in order to avoid any such embarrassment or question at anytime as to the willingness on the part of the President or the Secretary to resign if the Board so desired, the resignations of these two officers had been placed in the hands of the Secretary.

After a discussion, and

Upon motion duly made, seconded and carried, Mr. Booth dissenting, it was

RESOLVED that the resignations of the President and the Secretary be laid on the table.

The President then asked that consideration be given to the question of authority to reorganize the office staff.

[fol. 80] The matter was discussed, and it was the consensus of opinion that the President has authority to do such things as are necessary and that he should act under it.

There being no further business to come before the Board, upon motion duly made, seconded and unanimously carried, the meeting adjourned.

FLORENCE D. MEAD,
Secretary.

[fol. 81]

EXHIBIT D

MINUTES OF MEETING OF BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.

A Special Meeting of the Board of Directors of Trinity Operating Company, Inc. was held in the office of the President, 74 Trinity Place, in the City of New York, at 4:30 P. M. on November 5, 1942.

Present: The Rector, the President, Messrs. Stickney, Belknap, Davies, Davis, Bayne, Hasler, the Secretary and Mr. Shepard of Counsel.

The President acted as Chairman of the meeting and the Secretary of the Company acted as secretary.

Proof of Notice of the meeting was presented to the meeting by the Secretary.

A Waiver of Notice of meeting was signed by all Directors present.

The minutes of the meeting of October 30th, 1942 were presented and after a discussion,

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the Special Meeting of the Board of Directors held on October 30, 1942 be approved as corrected.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the resignations of the President and Secretary be taken off the table.

The President then read these resignations to the meeting, and

Upon motion duly made, seconded and unanimously carried, it was

[fol. 82] RESOLVED to accept the resignations of the President and the Secretary, as of November 30, 1942, and that a Committee be appointed to consider com-

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pensation to Mr. Stanton and Miss Mead in appreciation of their past services.

The President then asked that consideration be given to the question of reorganizing the staff and, after a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to appoint as the Committee above authorized, Messrs. Belknap, Davis, and Davies, and that this Committee be asked to take the necessary steps to investigate and interview applicants to succeed the present officers, with a view to reorganizing and reestablishing the organization, and to report back to this Board.

There being no further business, upon motion duly made, seconded and unanimously carried, the meeting adjourned.

s/ FLORENCE D. MEAD,
Secretary.

[fol. 83]

EXHIBIT E

MINUTES OF SPECIAL MEETING OF DIRECTORS OF TRINITY OPERATING COMPANY, INC.

The adjourned meeting of the Board of Directors of Trinity Operating Company was held on November 19, 1942 at 4 P. M. in the office of the President, 74 Trinity Place, New York.

Present: The Rector, the President, Messrs. Belknap, Davis, Bayne, Davies, Hasler, the Secretary and Mr. Shepard of Counsel.

Messrs. Booth and Stickney asked to be excused.

The President presided as Chairman of the meeting. Notice of Meeting was presented by the Secretary and a Waiver of Notice of Meeting was signed by all members present.

The minutes of the meeting of November 5, 1942 were read, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on November 5, 1942 be approved as read.

The Chairman then read a letter addressed by Mr. Stickney to Miss Mead, under date of November 9th, acknowledging the receipt of the minutes of the meetings of the Board of Directors of October 14th, 28th and 30th, and of November 5th, and adding that several parts of the minutes are not at all in accordance with his recollection of what took place.

It was the consensus of opinion that the Secretary should obtain from Mr. Stickney a statement as to the particular minutes referred to by Mr. Stickney.

The Chairman then read a letter which had been addressed by Mr. Booth to the Secretary under date of November 9th, in which Mr. Booth stated that the memorandum of notes taken by the Secretary did not seem clear and were of a more or less disconnected character. This letter was received.

The President then read the following letter which had been addressed by him to the Trinity Operating Company, Inc.

November 9, 1942.

Trinity Operating Company, Inc.,
74 Trinity Place,
New York, N. Y.

GENTLEMEN:

Inasmuch as a question was raised by a Vestryman of Trinity Church as to the value of the stock accepted in payment of rent due from Standard & Poor's Corporation, and notwithstanding the fact that,

First: At the time of this adjustment, Mr. Paul T. Babson paid in cash \$100. per share for 1,000 shares of the same stock, and

Second: The fact that Standard & Poor's Corporation has earned the dividends due on this stock,

I have returned to the Trinity Operating Company, Inc. \$722.16, representing the amount of profits distributed to the officers under their contracts on the reserve set up by Patterson, Teel and Dennis, Accountants, against this stock.

Very truly yours,

(signed) ALDEN D. STANTON,
President."

[fol. 85] The President then stated that a vacancy existed in the Directorate due to the resignation of Mr. Frank R. Outerbridge and called for nominations.

Mr. J. Taylor Foster was nominated, and there being no further nominations,

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that Mr. J. Taylor Foster be elected as Director of the Trinity Operating Company, Inc.

The Chairman then stated that his resignation as a Director had been presented, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the resignation of Mr. Alden D. Stanton as a Director be accepted as of November 30th, 1942.

The Chairman then stated that he had received the resignation of Mr. Hance C. Hamilton, Personnel Manager of the Trinity Operating Company, Inc.; that he had arranged with Mr. Hamilton to remain until November 30th, and had agreed to pay him two weeks salary beginning December 1st, 1942, in appreciation of his services to the company.

The meeting then recessed and the President and the Secretary retired from the meeting.

During this recess the Report of the Special Committee was discussed and the Rector entered the meeting.

The Chairman of the Special Committee stated that it made the following recommendations:

WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of the Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942, and

WHEREAS Miss Florence D. Mead has resigned from all positions and offices held under the Corporation of Trinity Church and its subsidiaries; and

WHEREAS such resignations have been accepted to be effective as of November 30, 1942;

BE IT RESOLVED that, in appreciation of the services rendered by Miss Mead throughout nearly ten years, a gratuity of three thousand dollars is hereby awarded to her, payable in monthly instalments of \$300. each commencing with the month of December 1942; provided that with the termination of her services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942.

[fol. 87] Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to approve the recommendations of the Special Committee as above stated.

There being no further business, upon motion duly made, seconded and unanimously carried, the meeting adjourned until Monday, November 23rd, 1942, at 2:30 P. M.

FLORENCE D. MEAD,
Secretary.

At a meeting of the Board of Directors of the Trinity Operating Company, Inc., held on January 8th, 1943, the following corrections in the above minutes were authorized:

"RESOLVED that corrections be made in the minutes of the meeting of the Board held on November 19th, 1942, to show the following:"

It was reported resignation as a Trustee under the Pension Plan of the Trinity Operating Company, Inc. had been received from Mr. Alden D. Stanton, such resignation to be subject to the pleasure of the Board of Directors.

It was also reported resignation as Secretary of the Pension Plan of the Trinity Operating Company, Inc. had been received from Miss Florence D. Mead, such resignation to be subject to the pleasure of the Board of Directors.

Upon motion duly made, seconded and carried, it was

RESOLVED that the resignation of Alden D. Stanton as Trustee of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942.

[fol. 88] RESOLVED that the resignation of Florence D. Mead as Secretary of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942.

I hereby certify that the foregoing are true and correct corrections to the minutes of the meeting of the Board of

Directors of the Trinity Operating Company, Inc. held on November 19th, 1942, which corrections were authorized by the Board at its meeting held on January 8th, 1943.

P. A. M. CROUCH,
Secretary.

[fol. 89]

EXHIBIT F

MINUTES OF MEETING OF BOARD OF DIRECTORS

The adjourned meeting of the Board of Directors of Trinity Operating Company, Inc. was held on Monday, November 23rd, 1942 at 2:30 P.M. in the office of the President, 74 Trinity Place, New York.

Present: The Rector, the President, Messrs. Belknap, Davis, Davies, Stickney, Booth, the Secretary and Mr. Shepard of Counsel.

The President presided as Chairman and the Secretary acted as secretary of the meeting.

Notice of Meeting was presented by the Secretary and a Waiver of Notice was signed by those Directors present.

The minutes of the meeting of November 19th, 1942 were presented and the Chairman read these minutes to the Board.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on November 19, 1942 be approved as read.

Reference was made to the letter written by Mr. Stickney under date of November 9th, 1942 regarding the minutes of previous meetings, and Mr. Stickney suggested that in the minutes of the meeting of October 28th, 1942 the following paragraph be expunged:

"It was the consensus of opinion that no further action should be taken but that the Treasurer's resignation should be effective as of October 31, 1942; that

his duties should cease as of that date, and further that an offer be made to pay his salary for six months beginning November 1st."

[fol. 90] and that the following be substituted therefore:

"The President was directed to proceed with the carrying out of the resolution adopted at the meeting of October 14, 1942 to terminate the employment of the Treasurer. The Treasurer was to be given an opportunity to resign if he desired to do so."

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on October 28th, 1942 be amended in accordance with Mr. Stickney's suggestion as above outlined.

Mr. Stickney further suggested that consideration be given to the following statement in the minutes of the meeting of the Board of Directors held on October 30th, 1942:

"The President stated that he had advised the Treasurer of the offer of the Board, made at its meeting of October 28th, and had outlined to him the proposal that he resign as of October 31st, and further that his salary would continue for six months beginning November 1st."

"The President then asked if the offer to pay salary for six months period was contingent upon the Treasurer's resigning and stated that he would like to have instructions as to what, if anything, should be paid after the Treasurer's dismissal on October 31st."

and suggested the word "offer" be changed to "suggestion".

Upon motion duly made, seconded and unanimously carried, it was

[fol. 91] RESOLVED that the minutes of the meeting of the Board of Directors held on October 30th, 1942 be

changed so as to substitute the word "suggestion" for the word "offer" as above outlined.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED that the minutes of the meeting of the Board of Directors held on October 30th, 1942 be amended by adding to the last resolution on Page 1 of these minutes the following: "provided that, with the discontinuance of his services, the Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31st, 1942."

The meeting then recessed, and upon the meeting being reconvened, the President asked the pleasure of the Board. Admiral Belknap, the Chairman of the Special Committee, stated that the Committee was ready to report, and after a discussion, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Reginald R. Belknap President of the Trinity Operating Company, Inc. as of December 1st, 1942 with power to sign checks, together with any other officer so authorized, drawn on funds in any authorized bank account of the company, his compensation to be fixed by the Board of Directors, and it was

FURTHER RESOLVED to employ the services of Mr. Fenimore C. Goode as Assistant to President to take effect immediately, and continue at the pleasure of the Board of Directors, with the understanding that his [fol. 92] compensation shall be determined by Admiral Reginald R. Belknap with power.

Admiral Belknap then resigned as Assistant Treasurer to be effective as of November 30th, 1942, and

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to accept the resignation of Admiral Reginald R. Belknap as Assistant Treasurer to be effective as of November 30th, 1942.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Mr. Robert T. Gregory Assistant Treasurer of the Trinity Operating Company, Inc. with power to sign checks, together with any other officer so authorized, drawn on funds in any authorized bank account of the company, with the understanding that this office shall be as of December 1, 1942, and continue at the pleasure of the Board.

There being no further business, the meeting adjourned.

FLORENCE D. MEAD,
Secretary.

[fol. 93]

EXHIBIT G

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF TRINITY OPERATING COMPANY, INC.

A meeting of the Board of Directors of the Trinity Operating Company, Inc. was held on Monday, December 28th, 1942, at 4:15 P.M., in the Office of the Comptroller of the Corporation of Trinity Church, 74 Trinity Place, New York, N. Y.

Present: The Rector, the President, Messrs. Basler, Foster, Booth, Stickney, Davies, Davis and Mr. Shepard of Counsel.

The President presided as Chairman and acted as Secretary of the meeting.

Notice of Meeting was presented by the President and a waiver of notice was signed by those Directors present.

Reference was made to letters written by Mr. Stickney under dates of November 30th and December 8th, 1942,

requesting correction of the minutes of the meeting of October 30th, 1942.

Upon motion made, seconded and unanimously carried, it was

RESOLVED that the resolution in the minutes of the meeting of Trinity Operating Company, Inc. of October 30th, 1942, relating to payment to Mr. Harris W. Watkins in appreciation of his past services be amended to read as follows:

RESOLVED that the President be authorized to pay to Mr. Harris W. Watkins the sum of \$8,000. in equal monthly installments of \$1,333.33 each for a period of six months beginning November 1, 1942, in appreciation of his past services; provided that with the dis- [fol. 94] continuance of his services, Trinity Operating Company, Inc. is released from all rights and claims to pension and retirement benefits not already accrued up to October 31, 1942.

After discussion and upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Miss Phyllis A. M. Crouch Secretary of the Trinity Operating Company, Inc., to continue at the pleasure of the Board.

After discussion and upon motion duly made; seconded and unanimously carried, it was

RESOLVED that Fenimore C. Goods, Assistant to the President of the Trinity Operating Company, Inc., be empowered to sign cheques, together with any other officer so authorized, drawn on funds in any authorized bank account of the company

s/ _____,
Acting Secretary.

[fol. 95]

EXHIBIT H

MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF
TRINITY OPERATING COMPANY, INC.

A meeting of the Board of Directors of the Trinity Operating Company, Inc. was held on Friday, January 8th, 1943, at 4 P.M., in the Office of the Corporation of Trinity Church, 74 Trinity Place, New York, N. Y.

PRESENT: The Rector, Admiral Belknap, President, Messrs. Davis, Davies, Booth, Hasler, Foster, Bayne, Mr. Shepard of Counsel and the Secretary. Mr. Stickney had asked to be excused.

The President acted as Chairman of the meeting and the Secretary of the Company acted as Secretary.

The minutes of the meeting of December 28th, 1942, were presented to the meeting and, copies thereof having been sent to each member, the reading thereof was dispensed with.

Upon motion made, seconded and carried, it was

RESOLVED that said minutes be approved and that the action of the Board at said meeting be ratified.

The President called attention to the fact that the minutes of the meeting of the Board held November 19th, 1942, did not specifically show the resignations of Mr. Alden D. Stanton as Trustee and Miss Florence D. Mead as Secretary of the Trinity Operating Company, Inc. Retirement Plan and the acceptance of those resignations by the Board as of November 30th, 1942.

Upon motion made, seconded and carried, it was

RESOLVED that corrections be made in the minutes of the meeting of the Board held on November 19th, 1942, to show the following:

[fol. 96] "It was reported resignations as a Trustee under the Pension Plan of the Trinity Operating Company, Inc. had been received from Mr. Alden D. Stan-

ton, such resignation to be subject to the pleasure of the Board of Directors."

"It was also reported resignation as Secretary of the Pension Plan of the Trinity Operating Company, Inc. had been received from Miss Florence D. Mead, such resignation to be subject to the pleasure of the Board of Directors."

"Upon motion duly made, seconded and carried, it was

"RESOLVED that the resignation of Alden D. Stanton as Trustee of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942."

"RESOLVED that the resignation of Florence D. Mead as Secretary of the Trinity Operating Company, Inc., Retirement Plan be accepted to take effect on November 30th, 1942."

After discussion and upon motion duly made, seconded and unanimously carried, it was

RESOLVED that Mr. Allan Davies be elected a Trustee of the Trinity Operating Company, Inc. Retirement Plan to take the place of Alden D. Stanton who resigned, as of November 30th, 1942.

Mr. Davis presented a report of the Special Committee appointed at the meeting of the Board held on November 5th, 1942, consisting of Messrs. Belknap, Davis and Davies, "to take the necessary steps to investigate and interview applicants to succeed the present officers, with a view to [fol. 97] reorganizing and reestablishing the organization".

Mr. Davis stated that the Special Committee wished to nominate for the Presidency of the Trinity Operating Company, Inc., Mr. Alfred Francis Gregory Nowakoski, and read a report concerning Mr. Nowakoski and his experience.

Discussion took place and, thereupon, Admiral Belknap tendered his resignation as President of the Trinity Operating Company, Inc., at the pleasure of the Board.

Upon motion duly made, seconded and unanimously carried, it was

~~RESOLVED~~ to accept the resignation of Reginald R. Belknap as President of the Trinity Operating Company, Inc., as of January 15th, 1943; and be it

FURTHER RESOLVED as a slight evidence of the Board's appreciation of his goodness in taking over the work of this officership from November 30th, 1942, to award Admiral Belknap an honorarium of Five Hundred (\$500.) Dollars.

Upon motion duly made, seconded and unanimously carried, it was

RESOLVED to elect Alfred Francis Gregory Nowakoski as President of the Trinity Operating Company, Inc., as of January 15th, 1943, with power to sign cheques, together with any other officer so authorized, drawn on funds in any authorized bank account of the Company; his holding office to continue at the pleasure of the Board of Directors; and be it

[fol. 98] FURTHER RESOLVED that Mr. Nowakoski's salary as President of the Trinity Operating Company, Inc., be at the rate of Twelve Thousand (\$12,000.) Dollars per annum, to continue at the pleasure of the Board.

Upon motion made, seconded and unanimously carried, it was

RESOLVED that the Committee be given a vote of thanks for their work in connection with the selection of a new President of this Company.

There being no further business to come before the meeting, it was, upon motion, adjourned.

s/ P. A. M. CROUCH,
Secretary.

[fol. 99]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 329—October Term, 1958.

(Argued May 14, 1959)

Decided July 6, 1959.)

Docket No. 25569

ALDEN D. STANTON and LOUISE M. STANTON, Appellees,

—v.—

UNITED STATES OF AMERICA, Appellant.

Before: Hand, Swan and Hincks, Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Byers, J., presiding), granting judgment to the plaintiffs for the refund of an income tax for the year 1943, with interest.

Howard Heffron, for the appellant.

Clendon H. Lee, for the appellees.

HAND, Circuit Judge:

The plaintiffs sue to secure a refund of \$15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In [fol. 100] 1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was \$22,500. In November, 1943, he voluntarily resigned as Comptroller, and as president and director of the Operating Company, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller

of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars * * * provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of \$10,629.57. The plaintiffs eventually paid this with accumulated interest, \$15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although [fol. 101] the donee had no right to enforce its payment. The last of our decisions in *Carragan v. Commissioner*, 197 Fed. (2) 246, 248, so declares and in *Nickelsberg v. Commissioner*, 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus v. Commissioner*, 302 U. S. 34, is the only decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only \$4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus acquired."

"Unopco" made a general distribution as a "gift" or "honorarium" of \$600,000 to all the former employees of "Universal," of which the plaintiff's share was \$10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. In the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, [fol. 102] as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was thought to have no such rights, but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in deciding whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus v. Commissioner*, *supra*, at times it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham v. Commissioner*, 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support in action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure

of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitative terms of whatever financial gains the pastor may have contributed to the corporation. *Schaff v. Commissioner*, 174 Fed. (2) 893 (C. A. 5); *Mutch v. Commissioner*, [fol. 103] 209 Fed. (2) 390 (C. A. 3); *Abernethy v. Commissioner*, 211 Fed. (2) 651 (C. A. D. C.). We cannot say positively that in the case at bar this second factor may not have had any place in the action of the board of directors of the Operating Company; but, since Mr. Stanton's duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Commissioner's determination is wrong. *Welch v. Helvering*, 290 U. S. 111, 115; *Helvering v. Taylor*, 293 U. S. 507, 515; his decision is *prima facie* correct; *Wickwire v. Reinecke*, 275 U. S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, Circuit Judge (dissenting):

In *Helvering v. American Dental Co.*, 318 U. S. 322, 327, it was said: "The narrow line between taxable bonuses and tax free gifts is illuminated by *Bogardus v. Commissioner*, [vol. 104] 302 U. S. 34, on the one side and upon the other by *Noel v. Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co. v. Commissioner*, 257 U. S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel*.

In *Bogardus v. Commissioner*, 302 U. S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the disbursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there might be ground for the inference that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would necessarily have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646, at 648-9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donee, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

* In the *Noel* case, referred to in *Helvering v. American Dental Co.*, *supra*, as illuminating the dividing line from the other side, there were factors not present here, which

[fol. 105] cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration." Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

" * * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt."

"We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481."

In the case now before us a search "among competing aims or motives [for] the ones that dominated conduct" will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton

into close personal contact* with the vestry and wardens of the church and with the directors of the Operating Company several of whom testified that a general feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate;** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus*, rather than more complete requital for past service, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general finding below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is not so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters v.*

* Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of "good will, esteem, or kindness," than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

** It was almost twice that later provided for his successor.

Smith, 3 Cir., 221 F. 2d 721; *Nickelsburg v. Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the Tax Court,* may not be disturbed unless clearly erroneous. *Plaunt v. Munford*, 2 Cir., 188 F. 2d 543; *Smith v. Hocy*, 2 Cir., 153 F. 2d 846; *Scott v. Self*, 5 Cir., 208 F. 2d 125; *Smythe v. Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U. S. 102; *Wickwire v. Reinecke*, 275 U. S. 101; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir., 25 F. 2d 837; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keeffe v. Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters v. Smith*, *supra*, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

[fol. 108] Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appellate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both *Carragan v. Commissioner*, 2 Cir., 197 F. 2d 246, and *Nickelsburg v. Commissioner*, *supra*, are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

* 26 U. S. C. A. §7482(a) provides

"(a) *Jurisdiction*.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; • • •"

[fol. 109]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ALDEN D. STANTON and LOUISE M. STANTON,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

JUDGMENT—July 6, 1959

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 120]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ORDER DENYING PETITION FOR REHEARING—July 30, 1959

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 141]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING EN BANC—
October 22, 1959

A petition for rehearing en banc having been referred to the active judges of this Court,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 142] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 143]

SUPREME COURT OF THE UNITED STATES

No. 546, October Term, 1959.

ALDEN D. STANTON, et al., Petitioners,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 376.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.

FILED

NOV 27 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 546

ALDEN D. STANTON, and LOUISE M. STANTON,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

BASIL O'CONNOR,
JOHN C. FARBER,
WILLIAM F. SNYDER,
CLENDON H. LEE,

Counsel for Petitioners,

120 Broadway,
New York 5, N. Y.

Of Counsel:

O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No.

ALDEN D. STANTON and LOUISE M. STANTON,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

ALDEN D. STANTON and LOUISE M. STANTON pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below.

The findings of fact and conclusion of law of the District Court (R 69-70)¹ are not officially reported. However, there is a reported memorandum of the District Court on petitioners' motion for summary judgment reported at 137 F. Supp. 803 and printed R 12-16. The opinion of the Court of Appeals (Appendix, *infra*, p. 23) is reported at 268 F. 2d 727.

¹"R" refers to the appendix to the appellant's brief in the Court of Appeals.

Jurisdiction.

The ~~judgment of~~ the Court of Appeals was entered on July 6, 1959. On July 20, 1959, a timely petition for rehearing was filed and such petition for rehearing was denied July 30, 1959. Petitioners thereafter moved the Court of Appeals for leave to file a petition for rehearing *en banc*, which motion was denied October 22, 1959. Mr. Justice Harlan by order has extended the time within which to file a petition for writ of certiorari to and including December 27, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

Alden D. Stanton², two weeks after his resignation as comptroller of the Corporation of Trinity Church in Manhattan had been accepted, was voted \$20,000 as a "gratuity" by the vestrymen of such Church in their capacity as vestrymen and also in their capacity as directors of the real estate holding subsidiary of the Church. The question is whether the \$20,000 gratuity was a gift excludable under Section 22(b)(3) of the Internal Revenue Code of 1939, as found by the District Court after trial or whether it was income as determined by a divided Court of Appeals.

Also presented is the scope and application of Rule 52 of the Federal Rules of Civil Procedure with respect to fact determinations in tax cases.

² Louise M. Stanton is a party only because she filed a joint return with her husband.

Statutes Involved.

Internal Revenue Code of 1939 (26 U. S. C. Section 22, 1952 ed., as applicable for the years 1942 and 1943):

SEC. 22. *Gross Income.*

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter.

* * *

(3) *Gifts, bequests, devises, and inheritances.* The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *

RULE 52. *Federal Rules of Civil Procedure, Findings by the Court.*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclu-

sions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement.

Alden D. Stanton was responsible for the financial affairs of one of the oldest corporations in the nation, the Corporation of Trinity Church in Manhattan. He was its comptroller. He was also president of a real estate holding corporation wholly owned by Trinity Church (R 72). On November 5, 1942, he submitted his resignation in order to go into business for himself (R 42). His resignation was accepted, but he was asked to reconsider (R 25). Stanton adhered to his decision to resign.

Two weeks thereafter, on November 19, 1942, the members of the vestry who comprised the directors of Trinity Church's real estate holding company made a gift to him (R 72). The uncontradicted oral testimony was that the gift was an "evidence of good will" (R 42); that he "was liked by all of the members of the vestry personally" (R 30-31). The gift was in the amount of \$20,000 and approximately half thereof was paid by the Corporation of Trinity Church and half by its subsidiary (R 13). /

It was only after he had departed that any part of the gift was received. The gift was made and the delivery thereof authorized in accordance with the following preambles and resolution (R 72):

"WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

"WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

"BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal installments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The resolution was drafted by Woolsey A. Sheppard, Esq., for many years a vestryman of and counsel to Trinity Church. Mr. Sheppard testified that it was the intention of the vestrymen to make Mr. Stanton a gift (R 30, 31).

Neither Trinity Church nor its subsidiary received any Federal tax benefit directly or indirectly, since both were charitable corporations exempt from income tax (R 26, 43). Payments were entered on the books of the donors as a gratuity (R 36, 37). Another vestryman and director stated that it was the unanimous intent of all of the directors to make Mr. Stanton a gift (R 40-41). Stanton did not vote

on the resolution (R 28). There was no withholding (R 26, 43) which would have been required from compensation. There was no business purpose in making the gift (R 28, 43). Stanton received his entire salary through the effective date of his resignation (R 25, 43). Stanton performed no services thereafter, nor did he refrain from doing anything (R 28, 42, 60, 63).

Stanton had no claim against Trinity or the operating company (R 24, 59). He did not request any payment (R 29) nor have any voice in voting it (R 28, 29, 43, 60). Stanton was held in high regard by the vestry and the directors (R 30, 31, 42).

The directors and vestry felt he had come in when Trinity's affairs were in a "difficult situation" and had done "a splendid piece of work" (R 31). Stanton also considered the payments a gift (R 60) and so designated them on his tax returns (R 63, 64).

The case may be summarized in

(a) the resolution set forth on page 5 hereof awarding a "gratuity".

(b) the testimony of Woolsey A. Sheppard, Esq., counsel who drafted the resolution, who voted for the resolution as a director of the operating company and who ratified it as a member of the vestry (R 30-31):

"Mr. Bee: 'Q. Can you state what the intent of the board of directors was in adopting such resolution? A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.

"He did a splendid piece of work, we felt.

"Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift? A. No question about it."

(c) the testimony of Frederick E. Hasler, then Chairman of the Continental Bank and Trust Company, who voted for the resolution as a director of the operating company, who ratified it as a vestryman, and who now serves as Senior Warden of Trinity Church (R 41-42):

"Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the Board of Directors was at the time of the adoption of that resolution?

"Mr. Rita: I object on the ground that the witness is incompetent to so testify:

"The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

"Q. Mr. Hasler, this meeting took place in 1942. Could you possibly recall anything which you or any other member of the Board said at that time? A. Yes sir, we were all unanimous in wishing to make Mr. Stanton a gift.

"Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

"We understood that he was going in business for himself.

"We felt that he was entitled to that evidence of good will."

All legal and factual questions were stipulated except the nature of the \$20,000 payment to Stanton (R 20, 69). Plaintiffs moved for summary judgment. The motion was denied in order to permit the government to have an opportunity to cross-examine (R 16).

As the facts set forth in Judge Abruzzo's memorandum denying the motion for summary judgment clearly show (R 12-16), the *only* question left for trial was the credibility of oral testimony.

The government produced no witness, and the testimony of the disinterested donor, through responsible witnesses, was that a gift was intended and made.

This testimony was believed by the trial court, as is evidenced by its decision (R 69, 70) rendered from the bench. Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1346 and 1402 (a) governing suits for refund of taxes illegally exacted.

Despite these findings of fact by the trial court, a majority of the Court of Appeals reversed over the dissenting opinion of Judge Hincks, who not only found the majority opinion to be in conflict with binding authority, but also to be beyond the power of an appellate court over findings by the trier of facts.

Reasons for Granting the Writ.

Summary.

1. The decision herein squarely and necessarily conflicts with this Court's holding and opinion in *Bogardus v. U. S.*, 302 U. S. 34.

It is just as contrary to the minority (for the reason set forth in paragraph numbered "2" following) in *Bogardus* as it is to the majority.

This case is in direct conflict with numerous decisions of other circuits, the Tax Court, and district courts.³

³ The case at bar conflicts with the following, to name only a few:

Bounds v. U. S., 262 F. 2d 876, C. A. 4;
Abernethy v. C. I. R., 211 F. 2d 651, C. A. D. C.;
Schall v. C. I. R., 174 F. 2d 893, C. A. 5;
Mutch v. C. I. R., 209 F. 2d 390, C. A. 3;
Herschman v. Kavanaugh (E. D. Mich.), 120 F. Supp. 956; aff'd 210 F. 2d 654, C. A. 6;
Wright v. C. I. R., 30 T. C. 392.

The section of the law involved is the cornerstone of the income tax law, defining as it does gross income and exclusions therefrom. The provision in the present Code is substantially the same as in prior Codes and, following Congressional reenactment, the departure of the Court of Appeals from accepted construction will precipitate an expanding flow of litigation, unless this Court restates its views.

Consideration by this Court of the substantive question at the present time is particularly appropriate, since some aspects of the question of "gifts", and their exclusion from gross income, are presently before the Court, *U. S. v. Kaiser*, No. 55, cert. granted 359 U. S. 1010.

Moreover, petition for certiorari is pending in *C. I. R. v. Duberstein, et al.* (Dkt. No. 376) presenting the same question of substantive law (in a different factual context, however), and the Solicitor General deems this *Stanton* case to be in conflict therewith as evidenced by his printing the opinions herein as an appendix to his *Duberstein* petition.

2. The majority below made an extraordinary departure from the legal and common-sense requirement that litigants try a case before a trial court, and the trial court's findings of fact stand unless clearly erroneous.

The majority opinion is replete with patent errors in the events described and their sequence, resulting from substituting the majority's weighing of the evidence for that of the trial judge.

The result of the majority opinion below, if allowed to stand, is to exclude tax cases from the purview of Rule 52 of the Federal Rules of Civil Procedure.

Discussion.

1. This Court held in *Bogardus*:

"... a gift is nonetheless a gift because inspired by gratitude for ... past faithful service ...". (44)

Gifts to departing faithful stewards were held to be entirely proper and free of income tax.

In the case at bar, the majority held the payment not to be a gift because it was in "gratitude" for services rendered. And by way of emphasis, the majority noted

"Indeed the resolution was 'in appreciation of the services rendered' * * *".

This is in explicit conflict with *Bogardus*. It is in verbatim conflict with *Abernethy, supra*, where the gift was voted "in appreciation of his long and faithful service".

Thus, over strong dissent, the majority were constrained to engraft an exception upon the statute—to hold gifts to departed faithful stewards to be taxable. This judge-made exception to a clear statute, previously construed by this Court, can no more be justified than could the engrafting of an exception to tax gifts to blood relatives as income, since they, according to the ancient formula, receive gifts in consideration of love and affection.

Surely the class of departed faithful stewards must be as numerous, or nearly so, as that of blood relatives, and there is no more statutory warrant for taxing gifts to the one than there is to the other.

Mr. Justice Brandeis agreed with the majority in *Bogardus*, except that, while he might have found a gift, had he been the trial judge, he could not disturb a contrary finding of fact. Therefore, no support for the majority below can be found in Mr. Justice Brandeis's dissent, for he believed that the trial court had evaluated "competing aims and motives" and drawn inferences which an appellate court could not disturb.

It was for this reason that Judge Hincks dissenting herein elected to quote freely from Mr. Justice Brandeis's dissenting opinion to illuminate most dramatically the conflict of this case with both opinions in *Bogardus*. In addi-

tion, Judge Hincks observed that Stanton's salary, fully paid through resignation, was nearly twice that of his successor, showing as clearly as could possibly be shown that the services had been fully "required". "Full acquittance" having been given, and there being testimony corroborating the formal resolution with respect to personal liking, respect, admiration, and evidence of good will, Judge Hincks properly found all the requirements of Mr. Justice Brandeis's dissent fully satisfied in the record.

Two lower court cases called specifically to the attention of the court below should have prevented the error of the majority. For example, the Tax Court of the United States has happily expressed the standard in a situation where an attorney had successfully attacked the land laws of California which precluded ownership of real property by Japanese. Even though he received no compensation whatever for legal services, when persons of Japanese ancestry presented to him \$10,000, the Tax Court properly found a gift was intended and that there was no taxable income to him. The Tax Court stated:

"Respondent fails to distinguish between the motivating factor for making the payment and the intent with which the payment was made." *Wright v. C. I. R.*, *supra*, p. 394.

The other case, *Abernethy*, and one referred to by the majority, is truly an identical case in that the church body voted payment " . . . in appreciation of his long and faithful service". Trinity Church in the case at bar voted payment to Stanton "in appreciation of the services rendered by Mr. Stanton . . . throughout nearly ten years". The purported distinction by the majority between religious and secular employees is both irrelevant and gratuitous and, as the dissenting opinion fully pointed out, Stanton was not isolated from personal contact with the vestry.

But rather than following such extraordinarily similar and helpful cases, the majority commenced its discussion of the law by referring to two of its own decisions which involved wholly different facts. Moreover, in both of such decisions, the appellate court affirmed the findings of fact of the trial court.

The majority referred to *Nickelsberg v. Commissioner*, 154 F. 2d 70, where a 74% stockholder received \$7,500 as a "wedding gift" from the very entity which he dominated. Such a transparent contrivance did not commend itself to the Tax Court as creating a gift, and the findings of fact by the Tax Court were not set aside by the Court of Appeals.

Indeed, the *Nickelsberg* case more properly should have been referred to by the majority—not with respect to the question of statutory construction before the Court, but rather with respect to the refusal of the appellate court to disturb the findings of fact by the trial court. Such a case is clearly distinguishable from *Stanton*, where the recipient was never a vestryman; where he had terminated his employment relationship; and had no proprietary interest, as stockholder or otherwise, in Trinity Church and its wholly owned subsidiary. He therefore could never be considered to be in the same category as the majority stockholder-recipient in the *Nickelsberg* case.

Little light is cast upon the question by the other Second Circuit case referred to by the majority, *Carragan v. Commissioner*, 197 F. 2d 246, where an employee whose pay had been deliberately held down to a subsistence level to build up the assets of the company received additional compensation when interruptions of the Second World War made continuation of the company's business in the Far East impossible. *Stanton*, by contrast, received a salary of \$22,500 per annum and resigned to go into business for himself.

Neither of such cases has any application to that at bar, and neither of them can justify the complete overturning of the standard established by Congress and construed by this Court in the *Bogardus* case.

It was at this point that the majority below undertook a discussion of the *Bogardus* case. The majority referred to the fortuitous events of corporate reorganization and found in them some special meaning which the majority believed to account for the result in that case. Judge Hincks' dissent takes issue with the majority on this point and believes the reference to the steps in reorganization to be purely incidental. In any event, whatever the corporate steps may have been in *Bogardus*, the majority contradicted themselves, because in the same paragraph of the opinion (A25), the majority ascribed significance to the fact that the donees "remain in the employ of 'Universal'," and then stated that "if 'Universal' had continued its business", the holding in *Bogardus* might have been different.

It is believed that the *Bogardus* case does not depend for its vitality upon the niceties of corporate reorganization, and that the dissenting opinion below properly recognized the significance of the case, as have all other courts of appeal which have referred to it. The majority opinion may possibly mean that, were Trinity Church and its subsidiary to have been dissolved, the result would have been different. But it is difficult to imagine how such an event has any real relevance to the problem.

Confusion was compounded at the end of the majority opinion where the Court then made a statement, quoted below which, if taken literally, as it may well be in view of the importance and location of the Court which rendered it, is the most far-reaching statement in the entire opinion. It was by way of stating that the majority found its resolution of the problem unsatisfactory, but in doing so the Court went to the lengths of substituting the "taxing authorities"

for the district courts, and the Tax Court, and the Court of Claims for the purpose of determining facts.

The majority passed over entirely the fact that a trial judge, listening to witnesses upon the witness stand, had made a determination that the payment to Stanton was a gift. Such determination by the trial court is in accordance with elementary principles of tax law and every other kind of law known to our system. Nevertheless, the majority stated:

“We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the *taxing authorities*, but it is, as we have tried to show, inherently incapable of exact definition and we can think of no better standard.” (Emphasis supplied.)

This substitution of “taxing authorities” for the District Court is violative of every command of statute law, the Federal Rules, and indeed if intended to be taken literally would amount to an unconstitutional delegation of the legislative and judicial functions to the Executive Branch, affording a wholly independent ground for certiorari, or appeal on a constitutional question. Indeed, an example of the type of executive “legislation” we may expect from the “taxing authorities” is the widow and clergymen classifications (discussed *infra*, pp. 15-16) which have been established without benefit of the reasonableness generally ascribed to the Constitutional legislature.

At the risk of repetition, it is worth referring again to the *Abernethy* case where the minister was voted payments “in appreciation of the long and faithful service”. Since Trinity Church in the case at bar voted payment to Stanton “in appreciation of” ten years of service by Mr. Stanton, the Government in the court below argued that widows and clergymen were in a different class. The majority below accepted this discrimination against temporal employees of a church and, disregarding the established construction and

the plain language of this Court which explicitly found that gratitude for past services could properly inspire a gift, has now excluded from the class of those to whom gifts may be made the faithful servant and the able steward, a class hitherto considered peculiarly eligible to participate in the generosity of those capable of expressing generosity with money or things of value.

There is no warrant in the statute for such exclusion. Indeed, in the court below, the Government's brief went to the extreme lengths of seeking to fragment the word "gift", which Congress did not choose to do, so that gifts to widows and gifts to clergymen could be considered to be such, but gifts to others, who might be engaged in the temporal affairs of a church could not be excluded from income.

By revenue ruling (Revenue Ruling 55-422), the Commissioner has stated that he will not attack gifts to clergymen and by press release of August 25, 1958⁴ has stated

⁴ The full text of the Information Release (T. I. R. No. 87, 586 CCH, para. 6662) reads as follows:

Quoted in *Bounds v. U. S.*, *supra*.

"In view of a number of adverse court decisions in cases involving voluntary payments to widows by their deceased husbands' employers, the Internal Revenue Service today announced that it will no longer litigate, under the Internal Revenue Code of 1939, cases involving the taxability of such payments unless there is clear evidence that they were intended as compensation for services, or where the payments may be considered as dividends. Payments which will be considered 'voluntary' in applying this policy do not include payments made pursuant to a contract or otherwise binding obligation or pursuant to a plan or statute in effect before the husband's death.

"In line with this new litigation policy, field offices in the Service will similarly dispose of 1939 Code cases not yet in litigation.

"The Service emphasized that this announcement represents a litigation policy, implemented by consistent administrative action, pertaining to 1939 Code cases only. The position of the Service with respect to cases in this area arising under the Internal Revenue Code of 1954 involves other considerations and will be made the subject of a future announcement."

a policy of not litigating gifts to widows. In view of such demonstrated proclivity on the part of the Government to subdivide and to fragment the plain word of Congress and to erode the opinion of this Court, it is clear that the majority opinion below calls for consideration by the Court in order to prevent further chaotic administration of a most important provision of the income tax law. Upon brief, a more detailed consideration of the conflict with *Bogardus* will be appropriate than the short outline in this petition.

Whether the statute be unevenly applied, as evidenced by such public announcements, or whether the plain word of Congress be subdivided without warrant as the Government argued below; in either case, corrective consideration by this Court is required. The result below tilts the hand of justice.

2. The opinion below represents such a startling departure from customary standards of appellate review of findings of fact as to furnish a wholly independent reason for granting the writ. If the "clearly erroneous doctrine" set forth in Rule 52 is not to be followed in tax cases, appellate courts will necessarily be inundated by litigation to the detriment of the revenue and to the impairment of administration—all working unfairness to taxpayers.

The trial court rendered its decision after hearing the witnesses in the courtroom. The basic finding of the trial court (R 69-70) that the payment was a gift was amply supported by the following proof, through oral evidence primarily, in the record:

1. The resolution of the Board of Directors of Trinity Operating Company, Inc., (all of whom were vestrymen of Trinity) which was ratified by the full vestry of Trinity Church, provided that the payment to Stanton was a gratuity, such resolution stating that

"a gratuity is hereby awarded to him of twenty thousand dollars".

2. Prior to Stanton's resignation he had been paid in full for all services rendered by him.

3. Two weeks after Stanton's resignation had been accepted, the resolution was adopted which awarded him the gift, and Stanton had no voice or control in the voting of the payment to him.

4. Stanton was not discharged, nor was the termination of employment made necessary by circumstances beyond his control. He desired to set up his own business. He was requested to reconsider his resignation and stay with Trinity.

5. Stanton did not do anything or refrain from doing anything or perform any services in connection with the gift to him, nor was any request made of him to do anything or refrain from doing anything.

6. There was no business purpose to be served nor any necessity for Trinity Church or its subsidiary to retain or obtain Stanton's good will in the future, and the payments to Stanton were not made with any such purpose in mind.

7. All of the stock of Trinity Operating Company, Inc. was owned by the Corporation of Trinity Church and the Church ratified the resolution and paid approximately half the gift.

8. The payments to Stanton were entered on the books of Trinity Operating Company, Inc. and the Corporation of Trinity Church as a gratuity.

9. No information returns were filed by Trinity Operating Company, Inc. or the Corporation of Trinity Church with respect to the payments to Stanton.

10. Trinity Operating Company, Inc. and the Corporation of Trinity Church did not withhold Victory or other income taxes with respect to the payments

made in 1943 as they would have been required to do had the payments been additional compensation for services. It was not necessary to withhold taxes if the payments were a gift.

11. Finally, the record consists of oral testimony explicitly describing the payment as a gift from disinterested donors.

Judge Hincks, dissenting below, stated:

"Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52, 28 U. S. C. A. Findings by a trial judge, just as those by the Tax Court, may not be disturbed unless clearly erroneous. *Plant v. Munford*, 2 Cir. 188 F. 2d 543; *Smith v. Hoey*, 2 Cir. 153 F. 2d 846; *Scott v. Self*, 8 Cir. 208 F. 2d 125; *Smyth v. Barneson*, 9 Cir. 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; *Wickwire v. Reinecke*, 275 U. S. 101, 48 S. Ct. 43, 72 L. Ed. 184; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir. 25 F. 2d 337; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe v. Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646; 51 Harv. L. Rev. 167. In *Peters v. Smith*, supra, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside."

Commencing with the resolution itself, the formal act of a responsible institution which can be read only as effectuating a gift, the record is completely clear that the individuals who voted for such resolution did so with the intention that it be a gift and that it be given and received as an expression of personal affection, appreciation, respect, admiration and regard. It is therefore certain that the majority erred in its redetermination of facts, as the dis-

senting opinion so clearly points out. At the very least, there was before the trial court evidence from which a gift could properly have been inferred, and a gift was inferred. This is what the appellate court reversed.

The majority opinion is replete with patent errors, furnishing an object lesson in the wisdom of adhering to statutory limitations upon appellate review, and the expression thereof in Rule 52. Such errors include:

(a) Patent error in that the recital of facts of the majority opinion refers to Mr. Stanton's resignation and then states:

"* * * and a few days previously the Operating Company had passed a resolution * * *."

In point of time, the situation was the *opposite*. That is, Stanton resigned. His resignation was accepted on November 5th. Two weeks thereafter on November 19th the gift was made by resolution. The majority apparently were misled by the fact that the effective date of Stanton's resignation was the end of the month. This error has materially influenced the majority in that the majority distinguished the authority of *Bogardus* upon the apparent ground that there the donating corporation had ceased having an employer-employee relationship with the donees. For that reason the patent error in the sequence of events appears to have been crucial, since no part of the gift was received until after Stanton had left Trinity.

(b) Another patent error is the misreading of a proviso in the donative resolution that Trinity Church was released from all rights and claims to pension and retirement benefits "not already *accrued* up to November 30, 1942" (emphasis added). That date was the effective date of the resignation submitted the early part of the month. The gratuity was received after November 30. The mistake is in overlooking the word "*accrued*". It is patently errone-

ous to find as a fact that a person who retained everything that had "accrued" gave up anything whatsoever, or, as the majority said, made "assurance doubly sure," especially when the uncontradicted testimony was that nothing was given up.

The proviso plainly means, and was notice to the world, including presumptive heirs, that the gift paid after resignation, gave rise to no further accruals of pension rights, thus emphasizing that the payment was a gift.

Without laboring the point here, it is apparent that the majority must again have been confused with respect to sequence of events, and it is patent that the word "accrued" was overlooked. This point, neither briefed nor argued below, resulted from the majority's making their own way through the evidence, without due deference to the trial judge.

(c) A third patent error is the majority's statement:

"* * * there is no evidence that personal affection did enter into the payment * * *."

All the oral testimony bespeaks the contrary, as the dissent shows. True, the resolution is not effusive, nor is the testimony. The vestry and their counsel spoke in character. Their desire to be a benefactor was aptly expressed. The gift was effectuated decently and in order.

3. *Applicable to both reasons for granting the writ.*

The Government has elected to describe four determinants of what it calls the "gift-income dichotomy" in its brief in this Court in *Kaiser*. These are the headings in the Government's argument that strike, benefits are not gifts (Govt. brief in *Kaiser*, pp. 25-33).

Irrespective of what may be the disposition of that case, the arguments have a direct application to this case. By

applying such identical determinants or criteria to the facts relating to Mr. Stanton's receipt of a gratuity from Trinity Church, the payment to him is shown to be a gift. Every single argument of the Government in *Kaiser* that strike benefits are not gifts is an argument that the gratuity to Stanton was a gift. The Government said strike benefits are not gifts:

(a) Because they were not made out of affection, respect, admiration, charity or like impulses. The entire record in this case and specifically Judge Hincks' dissenting opinion show the contrary to be true in Stanton's case.

(b) Because of the anticipated benefit to the union by encouraging continuation of the strike in support of the union's objective. There was no benefit anticipated to Trinity Church or its subsidiary by the payment to Stanton.

(c) Because given in exchange for the recipient's performance of acts requested by and of benefit to the union. Stanton performed no acts, did not forbear, and did nothing for the benefit of Trinity Church or its subsidiary.

(d) Because paid pursuant to an obligation that was not itself created by way of a gift. There was no obligation of any sort to make the payment to Stanton. Rather, out of the goodness of the hearts of the members of the vestry, acting as such and in their capacity as directors of the real estate subsidiary, the payment was made to Stanton as evidence of their good will.

All services to be performed by Stanton were fully performed and he was paid his entire salary of \$22,500 per annum through the effective date of his resignation. He did not act nor did he refrain from acting as a result of the payment to him, nor was his conduct in any way affected by the gift, nor were any acts or forbearance requested by or required by Trinity Church.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be granted. If the petition is granted, the Court may wish to set this case (and the *Duberstein* case, if the petition therein is also granted) for argument together with *U. S. v. Kaiser*, No. 55.

Respectfully submitted,

BASIL O'CONNOR,
JOHN C. FARBER,
WILLIAM F. SNYDER,
CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

Of Counsel:

O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

APPENDIX.

Opinion of U. S. Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 329—October Term, 1958.

(Argued May 14, 1959)

Decided July 6, 1959.)

Docket No. 25569

 ALDEN D. STANTON and LOUISE M. STANTON,

Appellees,

v.

UNITED STATES OF AMERICA,

Appellant.

 Before:

 HAND, SWAN and HINCKS,
 Circuit Judges.

Appeal from a judgment of the District Court for the Eastern District of New York (Byers, J., presiding), granting judgment to the plaintiffs for the refund of an income tax for the year 1943, with interest.

HOWARD HEFFRON, for the appellant.

CLENDON H. LEE, for the appellees.

 HAND, Circuit Judge:

The plaintiffs sue to secure a refund of \$15,056.29 representing income taxes (principal and interest) paid for the year 1943, which they allege were illegally collected. In

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1933 or 1934 the plaintiff, Mr. Stanton, had been retained to manage the real property of Trinity Church in New York. Trinity Operating Company, Inc. was organized to take over this work and Mr. Stanton became its president and a member of its board of directors. Although he was also "Comptroller" of the church, he was never a vestryman or warden; and all his time was occupied in caring for its real estate; his salary was \$22,500. In November, 1943, he voluntarily resigned as Comptroller, and as president and director of the Operating Company, and a few days previously the Operating Company had passed a resolution that "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars . . . provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942." The plaintiffs—Mr. Stanton and his wife—filed joint income tax returns for the years 1942 and 1943, and in their return for 1943 admitted the receipt of the "gratuity" but did not include it in their income because it was a "gift." The Commissioner of Internal Revenue decided that it was income and assessed a deficiency for the year 1943 in the amount of \$10,629.57. The plaintiffs eventually paid this with accumulated interest, \$15,066.29, and filed a claim for refund upon whose denial they filed this action; and after a trial without a jury Judge Byers granted judgment in their favor.

It is clear in the decisions, perhaps especially in this circuit, that in such situations the test of "compensation" is not whether the donor is under any legal obligation to make the payment; but that it may be his "income" although the donee had no right to enforce its payment. The last of our decisions in *Carragan v. Commissioner*, 197 Fed. (2)

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246, 248, so declares and in *Nickelsberg v. Commissioner*, 154 Fed. (2) 70, we said (p. 71) that the test was whether "what was added was by way of more compensation for a deserving employee or merely to satisfy the employer's desire to become a benefactor." That is indeed not an exact standard, but unhappily it is about as good as any that has been made. *Bogardus v. Commissioner*, 302 U. S. 34, is the only decision of the Supreme Court on the subject and it held for the taxpayer by a vote of five to four. The "bonus" or "honorarium," as the donor there called it, was given by a corporation, called "Unopco," which had the same shareholders as the Universal Oil Products Company, which had been the employer of the donee. The shareholders of "Universal" had sold all their shares to another corporation, United Gasoline Company, reserving only \$4,000,000 for "Unopco," a corporation whose "only business was the investment and management of the assets thus acquired." "Unopco" made a general distribution as a "gift" or "honorarium" of \$600,000 to all the former employees of "Universal," of which the plaintiff's share was \$10,000. Although the shareholders of "Unopco" had been the same as those of "Universal," the donees were not continued as employees of "Unopco," but remained in the employ of "Universal." The Supreme Court seemed to set store upon the fact that "Unopco" was a separate venture, for Justice Sutherland repeated this circumstance as an important factor in the result. We have no warrant for supposing that, if "Universal" had continued its business, the results would have been the same. If the case at bar the business of the Operating Company continued after Mr. Stanton had resigned; moreover, his was a single payment made in "appreciation" of his particular services, and was not part of a free-handed distribution to all employees. Furthermore, as we have said, the resolution contained a proviso that Mr. Stanton should abandon all rights to "pension and retirement benefits." It is true that the uncontradicted testimony was that in fact he was

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thought to have no such rights; but nevertheless the conclusion is inescapable that the proviso was "to make assurance doubly sure," and it cannot be disregarded in deciding whether the payment was made wholly from generosity, for when that is the case such a proviso is certainly an incongruous addition.

It is impossible to reconcile the decisions, and before *Bogardus v. Commissioner, supra*, at times it appears to have been supposed that the test was whether the payment discharged an enforceable obligation. For example, the Third Circuit certainly assumed that this was true in *Cunningham v. Commissioner*, 67 Fed. (2) 205. Moreover in these situations, although not here, there may be an implied promise, which, though not expressed, could support an action in contract; as, for example, if it had been the established practice of the donor to give an "honorarium" to all employees who voluntarily resigned. Probably, we should suppose that, whenever an employee has discharged his duties with outstanding fidelity and capacity, any "honorarium" results from mixed motives: (1) the employer feels that the employee has given more than the bare measure of service required, and that the employer has therefore received more than he could legally have exacted; and (2) that the employer feels friendship, perhaps even affection, for the employee. We are disposed to believe that this accounts for the apparent uniformity with which courts have treated as gifts "honoraria" to clergymen. In such cases the parishioners are apt to be largely moved by gratitude for spiritual direction, kindness and affection and do not think in quantitative terms of whatever financial gains the pastor may have contributed to the corporation. *Schall v. Commissioner*, 174 Fed. (2) 893 (C. A. 5); *Mutch v. Commissioner*, 209 Fed. (2) 390 (C. A. 3); *Abernethy v. Commissioner*, 211 Fed. (2) 651 (C. A. D. C.). We cannot say positively that in the case at bar this second factor may not have had any place in the action of the board of directors of the Operating Company; but, since Mr. Stanton's

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duties were exclusively financial and there is no evidence that personal affection did enter into the payment, we should not assume that it did. Indeed, the resolution was "in appreciation of the services rendered" by him in the conduct of the business, and it is safe to assume that the "honorarium" for practical purposes was the result of the satisfaction of the Operating Corporation for the success of his real estate ventures. The Supreme Court has several times said that a taxpayer has the burden of proving that the Commissioner's determination is wrong. *Welch v. Helvering*, 290 U. S. 111, 115; *Helvering v. Taylor*, 293 U. S. 507, 515; his decision is prima facie correct; *Wickwire v. Reinecke*, 275 U. S. 101, 105. Certainly the taxpayers in the case at bar did not prove that to any substantial degree the "honorarium" was more than an expression of gratitude for exceptional services rendered.

We are indeed acutely aware that such a test goes far to leave the issue always in the hands of the taxing authorities, but it is, as we have tried to show, inherently incapable of exact definition, and we can think of no better standard.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

HINCKS, Circuit Judge (dissenting):

In *Helvering v. American Dental Co.*, 318 U. S. 322, 327, it was said: "The narrow line between taxable bonuses and tax-free gifts is illuminated by *Bogardus v. Commissioner*, 302 U. S. 34, on the one side and upon the other by *Noel v. Parrott*, 15 F. 2d 669, as approved in *Old Colony Trust Co. v. Commissioner*, 257 U. S. 716, 730." In my analysis the case here is far closer to *Bogardus* than to *Noel*.

In *Bogardus v. Commissioner*, 302 U. S. 34, it is true that the majority opinion points to the fact that the recipients of the bounty were never the employees of the dis-

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bursing company or its stockholders. But as I read the majority opinion this was at most a makeweight, not at all a decisive consideration. It was said, on page 41, that if the disbursements had been made by the employer, "or by stockholders of that company still interested in its success and in the maintenance of the good will and loyalty of its employees, there *might be ground for the inference* that they were payments of additional compensation." (Emphasis supplied.) This is a far cry from a holding that the result would *necessarily* have been otherwise if the employer-employee relationship had existed at the very moment of the disbursement. And obviously the added weight of this feature was minuscule: the payment came from the stockholders who had enjoyed the economic benefit resulting from the employment—from those who a day or two before had been the stockholders of the employer-corporation. Indeed, as Judge Hand observed in his opinion below, 88 F. 2d 646, at 648-9, "the intent and motive were precisely the same as though the shareholders had been the employers of the donees, which they were not." The other grounds of distinction advanced by my brothers are even more tenuous. Indeed, in my estimate they tend to support the conclusion of a gift, rather than to militate against it.

In the *Noel* case, referred to in *Helvering v. American Dental Co.*, *supra*, as illuminating the dividing line from the other side, there were factors, not present here, which cogently supported the conclusion of compensation. For in *Noel*, as Judge Parker points out, "it affirmatively appears that it [i.e., the questioned payment] was made upon a consideration." Moreover, in *Noel* it was reported by the corporate "donor" in its income tax return as a salary deduction.

And so, if the distinction between gift and compensation is a problem to be determined on an *ad hoc* basis—as is implicit in the *Bogardus* majority opinion—the instant case, in my judgment, should be classified as a gift: it is within the scope of the *Bogardus* decision.

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However, in the *Bogardus* case Justice Brandeis in his dissenting opinion, made a somewhat different approach to the problem. He said:

“* * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

“We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps, if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls. *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481.”

In the case now before us a search “among competing aims or motives [for] the ones that dominated conduct” will reveal evidence of the following facts. The employment relationship had been one that had brought Stanton into close personal contact* with the vestry and wardens

* Obviously, payments to an individual employee whose work has brought him into close personal touch with his employer may more readily be found to emanate from motives of “good will, esteem, or kindness” than payments to groups of employees who had had no personal contact with the employer. It is this personal feature of the relationship which goes far to explain the cases referred to by my brothers which held that payments to ministers constituted gifts.

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of the church and with the directors of the Operating Company several of whom testified that a general-feeling of gratitude, rather than a desire to supplement Stanton's salary, had prompted the payment. Stanton's salary in the past had been in no way inadequate; ** and the amount given was in no way geared to salary or years served. A vestryman and director of the Operating Company testified: "Mr. Stanton was liked by all the vestry personally. He had a pleasing personality." And the senior warden testified: "We understood that he was going into business for himself. We felt that he was entitled to that evidence of good will." The employment relationship was at an end when the payment was made and the donor derived no benefit therefrom aside from the satisfaction flowing from its expression of gratitude.

If these facts be added to those recited in my brothers' opinion the sum total, it seems to me, would adequately support a finding that "good will, esteem or kindliness," the touchstone of Justice Brandeis' dissenting opinion in *Bogardus*, rather than more complete requital for past services, had dominated the Operating Company in making the payment. And such a finding is implicit in the more general finding below. In *Bogardus*, the majority of the court thought the determination of the trier had "no support in the primary and evidentiary facts." That is not so here, as the evidence just referred to shows. The *Bogardus* minority found that "there was opportunity for opposing inferences," exactly the situation here. That being so, I think we may not disturb the finding of the dominating motive on which the judgment below was based. *Peters v. Smith*, 3 Cir. 221 F. 2d 721; *Nickelshurg v. Commissioner*, 2 Cir., 154 F. 2d 70.

Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil Procedure, Rule 52. Findings by a trial judge, just as those by the

** It was almost twice that later provided for his successor.

Opinion of U. S. Court of Appeals, Second Circuit.

Tax Court,* may not be disturbed unless clearly erroneous. *Plaut v. Mufford*, 2 Cir., 188 F. 2d 543; *Smith v. Hoey*, 2 Cir., 153 F. 2d 846; *Scott v. Self*, 5 Cir., 208 F. 2d 125; *Smythe v. Barneson*, 9 Cir., 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U. S. 102; *Wickwire v. Reinecke*, 275 U. S. 101; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir., 25 F. 2d 837; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe v. Cote*, 1 Cir., 213 F. 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646, 51 Harv. L. Rev. 167. In *Peters v. Smith*, *supra*, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside.

Thus I am brought to the conclusion that the holding of my brothers is in conflict with both of the *Bogardus* opinions and exceeds the power of an appellate court over findings by the trier of facts. Nor is the result reached required by the earlier cases in this circuit. Both *Carra-gan v. Commissioner*, 2 Cir., 197 F. 2d 246, and *Nickels-burg v. Commissioner*, *supra*, are distinguishable on their facts. Moreover, in both this court refused to disturb the finding of the trier.

I would affirm.

* 26 U. S. C. A. § 7182(a) provides

“(a) *Jurisdiction*.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; * * *.”

Judgment.

(Filed July 6, 1959.)

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record for the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded in accordance with the opinion of this Court.

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No. — 546

In the Supreme Court of the United States

OCTOBER TERM, 1959

ALDEN D. STANTON AND LOUISE M. STANTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

Department of Justice, Washington 25, D.C.

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STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

For the reasons stated in the petition for certiorari in *Commissioner v. Duberstein*, No. 376, this Term, the Government acquiesces in the petition in this case and respectfully submits that the Court should grant both this petition and the Government's petition in the *Duberstein* case and set the two cases for argument together with *United States v. Kaiser*, No. 55, certiorari granted, 359 U.S. 1010.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

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Respondent.

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BRIEF FOR PETITIONERS.

CLENDON H. LEE,

Counsel for Petitioners,

120 Broadway,

New York 5, N. Y.

Of Counsel:

JOHN C. FARBER,

WILLIAM F. SNYDER,

THEODORE Q. CHILDS,

O'CONNOR & FARBER,

120 Broadway,

New York 5, N. Y.

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BRIEF FOR PETITIONERS.

Opinion Below.

The opinion and dissenting opinion in the Court of Appeals (R 82-89) are reported at 268 F. 2d 727. The findings of fact and conclusions of law of the District Court (R-60) are not reported. However, there is a reported memorandum of the District Court on petitioners' motion for summary judgment reported at 137 F. Supp. 803 and printed R 11-15.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 6, 1959. The petition for a writ of certiorari was

filed November 27, 1959 and granted December 14, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

The ultimate question is whether the majority of the Court of Appeals erred in reversing the District Judge's finding that Trinity Church made a gift to Alden D. Stanton. To determine this question it is necessary to decide one or more of the following:

(1) whether the findings of fact by the trial judge on the basis of oral and documentary evidence were clearly erroneous;

(2) whether this Court should overrule its prior decision squarely in point, defining a gift;

(3) whether the explicit exemption by Congress of gifts from income tax is an appropriate subject for restriction by appellate courts.

Statutes Involved.

Internal Revenue Code of 1939 (26 U. S. C. Section 22, 1952 ed., as applicable for the years 1942 and 1943):

SEC. 22. *Gross Income.*

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain

or profit, or gains or profits and income derived from any source whatever. * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(3) *Gifts, bequests, devises, and inheritances.*

The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *

RULE 52. *Federal Rules of Civil Procedure, Findings by the Court.*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Statement.

Alden D. Stanton was responsible for the financial affairs of the Corporation of Trinity Church in Manhattan, which exists under a Charter from Queen Anne. He was its comptroller. He was also president of a real estate holding corporation wholly owned by Trinity Church (R 62). On November 5, 1942, he submitted his resignation in order to go into business for himself (R 37). He was asked to reconsider (R 22). However, Stanton adhered to his decision to resign. Stanton's salary, fully paid through the effective date of his resignation, was \$22,500 (R 55). His successor received only \$12,000, about half that (R 81).

Two weeks thereafter, on November 19, 1942, the members of the vestry who comprised the directors of Trinity Church's real estate holding company made a gift to him (R 62). The uncontradicted oral testimony was that the gift was an "evidence of good will" (R 37); that he "was liked by all of the members of the vestry personally" (R 26-27). The gift was in the amount of \$20,000, and approximately half thereof was paid by the Corporation of Trinity Church and half by its subsidiary (R 12).

It was only after he had departed that any part of the gift was received. The gift was made and the delivery thereof authorized in accordance with the following preambles and resolution (R 62):

"WHEREAS Mr. Alden D. Stanton has tendered his resignations from all the offices he held under the Corporation of Trinity Church and its subsidiaries; and

"WHEREAS said resignations have been accepted, to be effective as of November 30, 1942;

"BE IT RESOLVED that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal installments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

Trinity and its subsidiary had a pension plan to which the employer and the employee contributed. Upon termination of employment, an employee's rights were limited to

- (1) electing to have his own contributions refunded, or
- (2) electing to have his own contributions spent to purchase insurance policies.

Stanton elected to receive back his own contributions (R 30, 51).

The donative resolution contained a proviso making clear that neither Stanton nor Trinity was required to make additional contributions to the pension plan *after* the effective date of Stanton's resignation on account of the gift. Its effect was also to preclude any heir or legal representative from claiming that new pension rights or benefits arose after November 30, 1942, the effective date of the resignation (R 62, 29).

The resolution was drafted by Woolsey A. Sheppard, Esq., for many years a vestryman of and counsel to Trinity Church. Mr. Sheppard testified that it was the intention of the vestrymen to make Mr. Stanton a gift (R 26-27).

Neither Trinity Church nor its subsidiary received any federal tax benefit directly or indirectly, since both were charitable corporations exempt from income tax (R 23, 38). Payments were entered on the books of the donors as a gratuity (R 33). Another vestryman and director stated that it was the unanimous intent of all of the directors to make Mr. Stanton a gift (R 36-37). Stanton did not vote on the resolution (R 25). There was no withholding (R 23, 38) which would have been required from compensation. There was no business purpose in making the gift (R 25, 38). Stanton received his entire salary through the effective date of his resignation (R 22, 38). Stanton performed no services thereafter, nor did he refrain from doing anything (R 25, 37, 52, 55).

Stanton had no claim against Trinity or the operating company (R 22, 52). He did not request any payment (R 26) nor have any voice in voting it (R 25, 26, 38, 52). Stanton was held in high regard by the vestry and the directors (R 26, 27, 37).

The directors and vestry felt he had come in when Trinity's affairs were in a "difficult situation" and had done "a splendid piece of work" (R 27). Stanton also considered the payments a gift (R 52) and so designated them on his tax returns (R 55).

The case may be summarized in

(a) the resolution set forth on pages 4-5 hereof awarding a "gratuity".

(b) the testimony of Woolsey A. Sheppard, Esq., counsel who drafted the resolution, who voted for the resolution as a director of the operating company and who ratified it as a member of the vestry (R 26-27):

"Mr. Lee: 'Q. Can you state what the intent of the board of directors was in adopting such resolu-

tion? A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation.

"He did a splendid piece of work, we felt.

"Besides that, as I say, he was liked by all of the members of the Vestry personally.

"Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift? A. No question about it."

(c) the testimony of Frederick E. Hasler, then Chairman of the Continental Bank and Trust Company, who voted for the resolution as a director of the operating company, who ratified it as a vestryman, and who now serves as Senior Warden of Trinity Church (R 36-37):

"Q. On the basis of your participation in that meeting, and your voting, can you state what the intent of the Board of Directors was at the time of the adoption of that resolution?

"Mr. Rita: I object on the ground that the witness is incompetent to so testify.

"The Court: I will allow the witness to say what he heard any other directors say on the subject, and what he himself said, if he said anything, prior to the adoption of the resolution.

"Q. Mr. Hasler, this meeting took place in 1942. Could you possibly recall anything which you or any other member of the Board said at that time? A. Yes sir, we were all unanimous in wishing to make Mr. Stanton a gift.

"Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

"We understood that he was going in business for himself.

"We felt that he was entitled to that evidence of good will."

All legal and factual questions were stipulated except the nature of the \$20,000 payment to Stanton (R 18, 60). Plaintiffs moved for summary judgment. The motion was denied in order to permit the government to have an opportunity to cross-examine (R 15).

As the facts set forth in Judge Abruzzo's memorandum denying the motion for summary judgment clearly show (R 11-15), the *only* question left for trial was the credibility of oral testimony.

The government produced no witnesses, and the testimony of the disinterested donor, through responsible witnesses, was that a gift was intended and made.

This testimony was believed by the trial court, as is evidenced by its decision (R 60) rendered from the bench. Jurisdiction was conferred on the District Court by 28 U. S. C., Sections 1346 and 1402 (a) governing suits for refund of taxes illegally exacted.

Despite these findings of fact by the trial court, a majority of the Court of Appeals reversed over the dissenting opinion of Judge Hincks, who not only found the majority opinion to be in conflict with binding authority, but also to be beyond the power of an appellate court over findings by the trier of facts.

Summary of Argument.

A.

The Internal Revenue Code of 1939 is a specific expression of the will of Congress. The particular provision under consideration here "excludes" the value of property acquired by gift, and "exempts" it from income tax. This

has been in the law since 1913 to the present day, except for a brief interval under the 1916 Act.

Thus, Congress has^e looked upon the exclusion and exemption of gifts from income tax as one of the fixed points in its scheme of taxation, and one which is peculiarly within the province of Congress to maintain or to change at its pleasure.

Congress was aided by this Court's interpretation prior to both the Internal Revenue Code of 1939 and that of 1954, and chose to reenact the statute without change in this provision.

This Court's interpretation, successively approved by Congress, has occasioned no difficulty to, and has been followed many times by, the lower courts. But, in the case at bar a divided court purported to distinguish it, over the dissent of a judge who felt that the decision was in square conflict with this Court's interpretation.

B.

Put briefly, this Court believed that the facts and circumstances surrounding a payment should be examined to determine whether a payment is a gift. If the payment constitutes an inducement of some kind, or is intended to discharge a legal or moral obligation, then the payment is income and not a gift. On the other hand, if the evidence tends to show that the payment was not an inducement, and the payment was not in discharge of a legal or moral obligation, then the payment may be found by the trial court to be a gift.

Obviously, blood relationships are a common situation in which a gift might arise. Likewise, long association, in business or otherwise, would be a proper motive to inspire a gift. It was this latter situation which this Court

specifically examined, and found a gift had been made to a former employee.

By contrast, the majority below reversed the trial court and wrote an opinion which, for practical purposes, eliminates faithful stewards and old retainers from the class of people who might receive gifts. Congress has not established any such classifications. Former employees would appear to be among the natural objects of a donor's bounty, and have been understood by courts, and by Congress as well in view of the statute and its history, to be as eligible as others to receive gifts.

This Court believed the significant point was whether the donor made the gift without seeking or anticipating anything in return; not whether the donee occupied some particular relationship to the donor, whether blood, former employment, or otherwise.

Naturally, a determination of this point is one which a trial court is especially well suited to make

C.

The divided court below, however, has gone far toward removing this determination of fact from trial courts and has made an extraordinary departure from the "clearly erroneous" doctrine of Rule 52, FRCP. The Court of Appeals undertook to measure the degree of affection between donor and donee, a criterion which it is in no position to apply—it neither saw nor heard the witnesses, and a criterion which is not present in the statute. While affection might be one of the elements which a trial court would take into account in estimating the donor's desire to be a benefactor, it would not be the sole standard, but might be considered along with goodwill, admiration, esteem, kindness, and the lack of any inducement in the making of the gift.

The Vestry of Trinity Church regretfully accepted Stanton's resignation, and two weeks thereafter "awarded" him a "gratuity". Witnesses, including Trinity's counsel who drafted the resolution, testified that it was the intent of the donor to make a gift. The payment was not to make up for, or induce anything, since Stanton was fully and quite well paid and was going into business for himself. Rather, it was an expression of goodwill to him because he was well-liked personally, and the donor appreciated what he had done in the past.

All the facts and circumstances surrounding the making and delivery of the gift were fully explored on trial, and there was a reasonable basis for the trial court's determination that a gift had been made. Consequently, the trial judge could not have been "clearly erroneous" in making such a determination.

ARGUMENT.

I.

Gifts are excluded from gross income and exempt from taxation by explicit command of Congress.

In 1913,¹ Congress excluded from gross income and exempted from income tax "the value of property acquired by gift". Decades of reenactment in identical words, and in the form of internal revenue codes, hardly permit the conclusion that exemption of gifts from income tax stole

¹ 38 Stat. 114-116. This provision was apparently omitted for a brief interval under the 1916 Act (39 Stat. 117-57; Act of 1916, Sec. 2); see *Irwin v. Gavit*, (2 Cir. 1923) 295 F. 84.

“upon an unsuspecting legislature and pass[ed] unobserved”.²

The specific portion of the statute (Section 22(b)(3)) relevant here provided:

“(b) *Exclusions from gross income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter.

• • • • •

“(3) *Gifts, bequests, devises and inheritances.* The value of property acquired by gift • • •.”

Congress has practiced every variety of its art upon the tax laws. Technical amendments, broad and sweeping revisions, re-arrangements, “riders”, codifications—all have been employed. But “the value of property acquired by gift” remains exempt from income tax, as in 1913. These words exist in a statute which is detailed, specific, and imperative; a statute which “partake[s] of the prolixity of a legal code”³ • • •;” which, in very truth, it is.

The more Congress has changed other provisions of the tax laws, the more we must understand that the continued exemption of gifts from income tax is not only explicit, but vehement.

A pursuit of statutory changes⁴ sheds no light upon a provision which has not been changed. What Congress has not changed, it has affirmatively reenacted.

In retaining and reenacting the provision under consideration, Congress spoke with a specific, mandatory voice

² *M'Culloch v. State of Maryland*, 4 Wheat. 316, 402.

³ The quotation continues “• • • and could scarcely be embraced by the human mind”. *M'Culloch v. Maryland*, *supra*, 407.

⁴ The immensity of congressional activity is scarcely suggested by the annotations appearing at 26 U. S. C. A. Sec. 22, pp. 39-43, 1955 Ed.

in positive law. Therefore, this case involves no growth or evolutionary principle of common law or constitutional law. This case requires the firm application of a code.

The Sixteenth Amendment is to "endure" and is to be "expounded" as a part of the constitution⁵. It is to be, and has been, "adapted" to the fiscal crises of the nation. Likewise, this Court will not stultify the exercise by Congress of its broad power to define gross income. But the specific exclusion and exemption here before the Court is not to be "adapted". It is to be applied and enforced, unless and until Congress "adapts" it.

II.

The statute has been construed correctly by this Court, and Congress has approved this Court's construction.

This Court's correct construction in 1937 of the Revenue Act of 1928 in *Bogardus v. United States*, 302 U. S. 34, has twice been embedded into the statutory exemption in the Codes of 1939 and 1954, to say nothing of other revenue acts which must be understood as approving this Court's construction.

Even were the decision now to be considered wholly wrong, it would work mischief* for a court at this late date to excavate the Code and repossess its contribution to the statutory structure, upon which Congress has so long built.

Not only Congress, but the lower courts, except for a divided court in the case at bar, have given full recognition to the decision. Columns in *Sheppard's United States Citations* attest to this.

⁵ *McCulloch v. Maryland*, *supra*, 407, 415.

But nothing could be clearer than that *Bogardus* was correctly decided. The four dissenting Justices, speaking through Mr. Justice Brandeis, hardly differed, if at all, from the substantive interpretation of the majority speaking through Mr. Justice Sutherland.

The minority said:⁶

"We think there was a question of fact whether payment to this petitioner was made with one intention or the other. A finding either in his favor or against him would have had a fair basis in the evidence. It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. Perhaps if such a function had been ours, we would have drawn the inference favoring a gift. That is not enough. If there was opportunity for opposing inferences, the judgment of the Board controls."

Therefore, if the trier of fact had found a gift, the dissenting Justices would have joined in this Court's decision.

In *Bogardus*, this Court held:⁷

"* * * a gift is nonetheless a gift because inspired by gratitude for * * * past faithful service * * *"

The case at bar held the contrary—that the payment was not a gift because it was in "gratitude" for services rendered by the departed faithful steward. Herein, the majority below noted

"Indeed the resolution was 'in appreciation of the services rendered' * * *" (R 85).

This Court found no statutory warrant for creating a class of people to whom gifts could not be made merely

⁶ *Bogardus v. U. S.*, *supra*, 45.

⁷ *Ibid.*, 44.

because they were former employees. The Court below determined the opposite.

In *Bogardus*, a successful corporation was split by putting the liquid assets in a new corporation having substantially the same stockholders. The stockholders then sold the stock of the old corporation to a third party which continued the business of the old corporation and retained many of the employees of the old corporation. The new corporation made voluntary payments to Bogardus and others. The payments were held to be gifts.

It is clear that the motive for making the gifts was gratitude for past faithful service, as this Court stated. It is also clear that the payments were intended to be gifts.

This Court first observed that there was no express agreement to make the payments; that the disbursements were not made under any implied contract for services rendered or to be rendered; and that there was no moral obligation or legal duty to make the payments. There was no anticipated benefit to the payors

“beyond the satisfaction which flows from the performance of a generous act.”⁸

Thus, the situation is identical to that of Stanton, whose resignation had been accepted and who was going into business for himself.

The majority below misplaced this Court's emphasis in *Bogardus* upon there being no “anticipated benefit” to the donor arising out of the payments, and likewise misplaced this Court's further emphasis upon the donor's no longer being “interested” in the goodwill and loyalty of the donee and the success of the donor's future business activities. This Court described the changed relationship between the

⁸ *Ibid.*, 41.

donor and the donee in order to show there was no "anticipated benefit". By demonstrating there was no "anticipated benefit", this Court meant it would not be proper to draw an inference of consideration, which would support a further inference of compensation.

But the majority below seized upon the detail rather than the principle, and embraced the peculiarities rather than the substance, and failed to realize that this Court recited the steps in the reorganization as evidence to show a gift was made in the particular case, rather than as indispensable steps in the accomplishment of any future gift. Surely, Trinity Church can make a gift without first forming a new corporation to effectuate it. The result of such misplaced emphasis below was to explore the incidental and adventitious and ignore the generic.

In *Bogardus*, the donors had separated themselves from the donees by splitting up the enterprise and withdrawing from the operating part. In *Stanton*, the donee separated himself from the donor by resignation, accepted by the donor. Obviously, the important point is that making a gift upon termination of relationship has no tendency to promote the economic interest of the donor in the future. Any promotion of economic interest in the future might lead to an "inference" of consideration supporting a further inference of compensation, irrespective of whether the termination of relationship was occasioned by resignation or corporate reorganization.

In Judge Hincks' dissenting opinion in this case (R 86), he properly points out that the shifting relationships in *Bogardus* did not determine the nature and quality of the payment, a point which Judge Hand had affirmatively made in the lower court opinion in *Bogardus*.

The essence of the case is in this Court's statement:⁹

"There is entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act."

This Court considered and rejected three contentions advanced by the commissioner.

The first of such contentions was that, since the donors had benefitted by past services of the donees, there was no gift. This Court found that there was a natural inference that the donees had been fully compensated for their services.

In the case at bar, it is not necessary to infer full payment for services. The record shows repeatedly that the donee had received his full and adequate salary of \$22,500, and as Judge Hincks aptly pointed out (R 88), the salary was "almost twice that later provided for his successor."

Secondly, it was asserted in *Bogardus* that the informal expression "gift or honorarium" determined the nature of the payment to be compensation. This Court found that the addition of the word "honorarium" did not vitiate the word "gift", which, in the circumstances in which the expressions were employed, clearly indicated the true intent and meaning. In the case at bar, of course, such question is not involved, because the only word used is the word "gratuity", which cannot conceivably have any meaning other than outright gift.

It may well be that the majority below in the case at bar misled themselves by repeated use of the word "honorarium", and having settled upon that word, which does not appear in this record, deduced a decision, not only at vari-

⁹ *Ibid.*, 41.

ance with the law but also in flat contradiction to the explicit record. The donative resolution stated (R 62):

"a gratuity * * * is hereby awarded * * *."

The third contention of the Commissioner was that, in a subsequent resolution to effectuate the gift, the word "bonus" had been employed. In the present case the only resolution is the donative resolution awarding a "gratuity." The act of the donor in the present case, as demonstrated by the entire record without any contrary evidence, was to make and complete a gift, pursuant to such resolution.

This Court, in its final conclusion, referred again to the fact that the gift was made in recognition of past loyal services. Quite obviously, departed faithful stewards are not excluded from the class of people to whom gifts may be made, and equally obvious is the fact that any such exclusion of a class of persons from those who may be deemed donees for tax purposes would have to be by a subclassification made by Congress, and not by others. In the case at bar, of course, the gratuity was awarded in appreciation of ten years of faithful service, a situation identical to that in *Bogardus*.

The short dissent¹⁰ of Mr. Justice Brandeis turned on the proper deference of appellate courts for the trier of fact. Mr. Justice Brandeis observed that, had he been the trier of fact, he might have found a gift, but felt that the findings of fact should not be disturbed. If there is any slight difference of substantive law in the dissenting opinion, it only serves to emphasize the erroneous position taken by the majority below in the case at bar. Mr. Justice Brandeis and those voting with him would certainly be satisfied that where a donee who had received a salary

¹⁰ *Ibid.*, 44 and 45.

of \$22,500 for managing the real estate of a church resigned, and his successor was paid only half as much, that the donation of a flat amount could hardly be to "requite" him more fully. Surely "full acquittance" has been given, where one who afterwards receives a flat sum as a gift was formerly, during his employment, paid nearly double what his successor received. Moreover, the record here is replete with testimony showing "goodwill, esteem, or kindliness" which are the very words employed by Mr. Justice Brandeis. Surely, the testimony quoted (pp. 6-8 *supra*) constitutes at least what Mr. Justice Brandeis called "a fair basis in the evidence" upon which the trial judge could properly make a finding there was a gift.

Comparing the two cases, then, *Bogardus* affirmatively held that a gift could be inspired by gratitude for past faithful services, while the case at bar holds gratitude or appreciation to vitiate a gift.

Thus, over strong dissent, the majority below were constrained to engraft an exception upon the statute—to hold gifts to departed faithful stewards to be taxable. This judge-made exception to a clear statute, previously construed by this Court, can no more be justified than could engrafting an exception to tax gifts to blood relatives as income, since they, according to the ancient formula, receive gifts in consideration of love and affection.

Surely the class of departed faithful stewards must be as numerous, or nearly so, as that of blood relatives, and there is no more statutory warrant for taxing gifts to the one class than there is to the other.

Certainly, there is nothing in Mr. Justice Brandeis' dissent which would establish a subclassification of faithful retainers ineligible to receive gifts free of income tax, regardless of the finding of a trial court. Therefore, the

case at bar conflicts with both of the opinions in this Court and the views of all of the Justices.

Of course, this Court's decision should not be misconceived to mean the determination of a gift is purely a matter of "law". The largely stipulated record in *Bogardus*—in which the Court found "no support in the primary and evidentiary facts"¹¹ for the decision below—determined the legal consequences set forth in the opinion.

Before turning to a discussion of subsequent authority, it is well to consider that neither Trinity Church nor its subsidiary "deducted" the gratuity as an expense for business purposes (R 23, 38). In other types of cases, where a commercial corporation purports to make a gift, the manner in which such commercial corporation treats the payment in its own books and tax returns may appear to this Court to be one of the elements which should be taken into consideration as having a tendency to show whether a gift was, in fact, made. In *Bogardus*, the disbursements were charged to surplus, and not deducted from income. In the case at bar, the payments were charged to gratuities, and the question of deductibility by the donor does not arise.

Naturally, the Tax Court has had occasion frequently to follow the *Bogardus* case. For example, it has happily expressed the standard in a situation where an attorney had successfully attacked the land laws of California which precluded ownership of real property by Japanese. Even though he received no compensation whatever for legal services, when persons of Japanese ancestry presented to him \$10,000, the Tax Court properly found a gift was intended and that there was no taxable income to him. The Tax Court stated:

¹¹ *Ibid.*, 39.

"Respondent fails to distinguish between the motivating factor for making the payment and the intent with which the payment was made." *Wright v. C. I. R.*, 30 TC 392, 394.

This is one of the decisions demonstrating that the Tax Court experiences no difficulty in applying the statute as construed in *Bogardus*. Together with other courts,¹² it has found the legal standard to be clear and one which permits a fair and intelligent decision on the facts.

The *Wright* case was specifically called to the attention of the court below, as was *Abernethy v. C. I. R.*, 211 F. 2d 651, C. A. D. C., which is truly an identical case in that the church body voted payment " . . . in appreciation of his long and faithful service". Trinity Church in the case at bar voted payment to Stanton "in appreciation of the services rendered by Mr. Stanton . . . throughout nearly ten years." The purported distinction by the majority between religious and secular employees is both irrelevant and gratuitous and, as the dissenting opinion fully pointed out, Stanton was not isolated from personal contact with the vestry.

But rather than following such extraordinarily similar and helpful cases, the majority below commenced its discussion of the law by referring to two of its own decisions which involved wholly different facts. Moreover, in both of such decisions, the appellate court affirmed the findings of fact of the trial court.

¹² For example, courts have readily applied *Bogardus*, without seeking refined instructions from this Court, in the following cases, among many:

Bounds v. U. S., 262 F. 2d 876, C. A. 4;
Schall v. C. I. R., 174 F. 2d 893, C. A. 5;
Mutch v. C. I. R., 209 F. 2d 390, C. A. 3;
Hershman v. Kavanagh (E. D. Mich.), 120 F. Supp. 956; *aff'd* 210 F. 2d 654, C. A. 6.

They referred to *Nickelsberg v. Commissioner*, 154 F. 2d 70, where a 74% stockholder received \$7,500 as a "wedding gift" from the very entity which he dominated. Such a transparent contrivance did not commend itself to the Tax Court as creating a gift, and the findings of fact by the Tax Court were not set aside by the Court of Appeals.

Indeed, the *Nickelsberg* case more properly should have been referred to by the majority—not with respect to the question of statutory construction before the Court, but rather with respect to the refusal of the appellate court to disturb the findings of fact by the trial court. Such a case is clearly distinguishable from *Stanton*, where the recipient was never a vestryman; where he had terminated his employment relationship; and had no proprietary interest, as stockholder or otherwise, in Trinity Church and its wholly owned subsidiary. He therefore could never be considered to be in the same category as the majority stockholder-recipient in the *Nickelsberg* case.

Little light is cast upon the question by the other Second Circuit case referred to by the majority, *Carragan v. Commissioner*, 197 F. 2d 246, where an employee whose pay had been deliberately held down to a subsistence level to build up the assets of the company received additional compensation when interruptions of the Second World War made continuation of the company's business in the Far East impossible. The additional payment was to make up for past sacrifices.

Stanton, by contrast, received a salary of \$22,500 per annum and resigned to go into business for himself. His successor received little more than half as large a salary.

The majority below in the case at bar in the final paragraphs of their opinion candidly stated that their resolution of the case was unsatisfactory (R. 85). No occasion for

their perplexity would have arisen had they either followed Mr. Justice Brandeis' dissent in *Bogardus* and not disturbed the trial judge's findings, or had they properly applied the standard of law established by the majority of this Court that a gift may properly be "in recognition of" and not "in payment for" past services.

The majority below first tried to do too much in reformulating the statute and adding to it burdens which Congress did not impose. Then they expressed their incapacity to do so satisfactorily, and cast the entire burden back on the "taxing authorities". In so doing, the majority took away from the trial court its traditional function of determining fact questions, such as "negligence", "intent", "wilfulness", "reasonableness", etc., and lodged the responsibility for making such fact determinations in the two places least capable of making such determination, namely the executive branch ("taxing authorities") and appellate courts.

The result is unworkable, unfair, and directly contrary to the meaning and scope of this Court's prior interpretation, which Congress has necessarily adopted in successive amendments to the Internal Revenue Code.

III.

The findings of fact of the district court were not "clearly erroneous".

Upon the conclusion of the testimony, the trial judge made the following finding of fact (R. 60):

"The resolution of the Board of Directors of the Trinity Operating Company, Incorporated, held November 19, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and

the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Alden D. Stanton, in the amount of \$20,000 payable to him in monthly installments of \$2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943.

The finding of fact was made after listening to the testimony of witnesses relating to the following evidentiary facts, among others.

1. The resolution of the Board of Directors of Trinity Operating Company, Inc., (all of whom were vestrymen of Trinity) which was ratified by the full vestry of Trinity Church, provided that the payment to Stanton was a gratuity, such resolution stating that "a gratuity is hereby awarded to him of twenty thousand dollars" (R 72).

2. Prior to Stanton's resignation he had been paid in full for all services rendered by him (R 22, 38).

3. Two weeks after Stanton's resignation had been accepted, the resolution was adopted which awarded him the gift, and Stanton had no voice or control in the voting of the payment to him (R 25, 26, 38, 52).

4. Stanton was not discharged, nor was the termination of employment made necessary by circumstances beyond his control. He desired to set up his own business. He was requested to reconsider his resignation and stay with Trinity (R 37, 22).

5. Stanton did not do anything or refrain from doing anything or perform any services in connection with the gift to him, nor was any request made of him

to do anything or refrain from doing anything (R 25, 37, 52, 55).

6. There was no business purpose to be served nor any necessity for Trinity Church or its subsidiary to retain or obtain Stanton's good will in the future, and the payments to Stanton were not made with any such purpose in mind (R 25, 38).

7. All the stock of Trinity Operating Company, Inc. was owned by the Corporation of Trinity Church and the Church ratified the resolution and paid approximately half the gift (R 6, 12).

8. The payments to Stanton were entered on the books of Trinity Operating Company, Inc. and the Corporation of Trinity Church as a gratuity (R 32, 33).

9. No information returns were filed by Trinity Operating Company, Inc. or the Corporation of Trinity Church with respect to the payments to Stanton (R 23, 38).

10. Trinity Operating Company, Inc. and the Corporation of Trinity Church did not withhold Victory or other income taxes with respect to the payments made in 1943 as they would have been required to do had the payments been additional compensation for services. It was not necessary to withhold taxes if the payments were a gift (R 23, 38).

11. Finally, the record consists of oral testimony explicitly describing the payment as a gift from disinterested donors (see pp. 6-8 *supra*).

Judge Hincks, dissenting below, stated:

"Surely the finding below was not clearly erroneous within the purview of Federal Rules of Civil

Procedure, Rule 52, 28 U. S. C. A. Findings by a trial judge, just as those by the Tax Court, may not be disturbed unless clearly erroneous. *Plaut v. Mumford*, 2 Cir. 188 F. 2d 543; *Smith v. Hoey*, 2 Cir. 153 F. 2d 846; *Scott v. Self*, 8 Cir. 208 F. 2d 125; *Smith v. Barneson*, 9 Cir. 181 F. 2d 143. In other areas of tax law, questions going to intent have generally been dealt with as questions of fact. See *United States v. Wells*, 283 U. S. 102, 51 S. Ct. 446, 75 L. Ed. 867; *Wickwire v. Reinecke*, 275 U. S. 101, 48 S. Ct. 43, 72 L. Ed. 184; *Blakeslee v. Smith*, 2 Cir., 110 F. 2d 364; *White v. Bingham*, 1 Cir. 25 F. 2d 837; *Jahn v. Pedrick*, 2 Cir., 229 F. 2d 71; *Keefe v. Cote*, 1 Cir., 213 F. 2d 651. See also case note on *Bogardus v. Helvering*, 2 Cir., 88 F. 2d 646; 51 Harv. L. Rev. 167. In *Peters v. Smith*, supra, it was held that a jury finding that a payment was a gift, when made on conflicting evidence, may not be set aside."

Commencing with the resolution itself, the formal act of a responsible institution which can be read only as effectuating a gift, the record is completely clear that the individuals who voted for such resolution did so with the intention that it be a gift, and that it be given and received as an expression of personal affection, appreciation, respect, admiration and regard. It is, therefore, certain that the majority erred in its redetermination of facts, as the dissenting opinion so clearly points out. At the very least, there was evidence before the trial court from which a gift could properly have been inferred, and a gift was inferred. This is what the appellate court reversed.

The majority opinion is replete with patent errors, furnishing an object lesson in the wisdom of adhering to statutory limitations upon appellate review, and the expression thereof in Rule 52. Such errors include:

(a) Patent error in that the recital of facts of the majority opinion refers to Mr. Stanton's resignation and then states:

"* * * and a few days previously the Operating Company had passed a resolution * * *." (R 82)

In point of time, the situation was the *opposite*. That is, Stanton resigned. His resignation was accepted on November 5th. Two weeks thereafter on November 19th the gift was made by resolution. The majority apparently were misled by the fact that the effective date of Stanton's resignation was the end of the month. This error has materially influenced the majority in that the majority distinguished the authority of *Bogardus* upon the apparent ground that there the donating corporation had ceased having an employer-employee relationship with the donees. For that reason the patent error in the sequence of events appears to have been crucial, since no part of the gift was received until after Stanton had left Trinity.

(b) Another patent error is the misreading of a proviso in the donative resolution that Trinity Church was released from all rights and claims to pension and retirement benefits "not already *accrued* up to November 30, 1942" (emphasis added). That date was the effective date of the resignation submitted the early part of the month. The gratuity was received after November 30. The mistake is in overlooking the word "*accrued*". It is patently erroneous to find as a fact that a person who retained everything that had "*accrued*" gave up anything whatsoever, or, as the majority said, made "assurance doubly sure," especially when the uncontradicted testimony was that nothing was given up.

The proviso plainly means, and was notice to the world, including presumptive heirs, that the gift paid after resignation, gave rise to no *further* accruals of pension rights, thereby emphasizing that the payment was a gift and not compensation.

It is apparent that the majority must again have been confused with respect to sequence of events, and it is patent that the word "accrued" was overlooked. This point, neither briefed nor argued below, resulted from the majority's making their own way through the evidence, without due deference to the trial judge.

(c) A third patent error is the majority's statement:

"* * * there is no evidence that personal affection did enter into the payment * * *."

All the oral testimony bespeaks the contrary, as the dissent shows. True, the resolution is not effusive, nor is the testimony. The vestry and their counsel spoke in character. Their desire to be a benefactor was aptly expressed. The gift was effectuated decently and in order. Moreover, affection is not a criterion; it would simply be some evidence tending to show a gift.

From all of the foregoing, it is absolutely certain that there were primary and evidentiary facts in the record adequate to support the trial judge's finding that there was a gift and the legal conclusion that no taxes arose. The District Judge's determination was not "clearly erroneous".

Conclusion.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, N. Y.

Of Counsel:

JOHN C. FARBER,
WILLIAM F. SNYDER,
THEODORE Q. CHILDS,
O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

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No. 546

In the Supreme Court of the United States

OCTOBER TERM, 1959

ALDEN D. STANTON AND LOUISE M. STANTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

J. LEE HANLIN,
Solicitor General,

CHARLES K. RICE,
Assistant Attorney General,

WAYNE G. BARNETT,
Assistant to the Solicitor General,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 546

ALDEN D. STANTON AND LOUISE M. STANTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 82-89) are reported at 268 F. 2d 727. The District Court rendered no opinion; its one-sentence findings of fact and conclusions of law (R. 60) are not reported. The District Court's memorandum opinion denying petitioners' motion for summary judgment (R. 11-15) is reported at 137 F. Supp. 803.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1959 (R. 90), and timely petitions for rehearing were denied on July 30, 1959, and October 22, 1959 (R. 90-91). The petition for certiorari was filed on November 27, 1959, and granted on December 14, 1959 (R. 91; 361 U.S. 923).

QUESTION PRESENTED

Whether a "gratuity" given by a corporation to a resigning officer "in appreciation of" his past services is a gift excludible from income under § 22(b)(3) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The principal statutory provision involved is § 22(b)(3) of the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.), which excludes from gross income the "value of property acquired by gift * * *." That section, and other statutory provisions pertinent to consideration of this case, are set out in Appendix A, *infra*.

STATEMENT

Petitioner¹ was the comptroller of the Corporation of Trinity Church in New York City and the president of its real estate holding corporation, the Trinity Operating Company, both of which were tax-exempt organizations. His salary was \$22,500 (R. 54-55). On November 5, 1942, petitioner resigned from both offices, effective November 30 (R. 67, 68-69). On November 19, 1942, the board of directors of the Operating Company adopted the following resolution (R. 61-62):

Be it resolved that in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten

¹ Alden D. Stanton will be referred to as the sole petitioner, his wife being a party only because they filed joint income tax returns.

years, and as President of Trinity Operating Company, Inc., its subsidiary, a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal installments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; * * *

The resolution was approved by the vestry of the church (R. 21-22), and approximately half of the payment (\$9,600) was paid by the church (R. 12). The payments were entered on the books of the operating company and the church as a gratuity (R. 32-33), and neither withheld income taxes or reported the payment on an information return (R. 23, 38).

In his federal income tax return for 1942 and 1943, petitioner disclosed the receipt of the \$20,000 but claimed that it was excludible as a gift under § 22(b) (3) of the Internal Revenue Code of 1939.² Upon a deficiency being asserted, petitioner paid the additional tax and in due course, on June 11, 1954, brought this suit for refund (R. 4-8).

Woolsey A. Sheppard, who, as general counsel of the church and the operating company, had drafted the resolution and, as a director and vestryman, had voted for its adoption, testified (R. 27):

Q. At the time you voted on the resolution, Mr. Sheppard, what was your intention?

A. To give Mr. Stanton a gift.

* * * * *

² Unless otherwise indicated, all section references are to the Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.).

Q. Can you state what the intent of the board of directors was in adopting such resolution?

A. Yes, based on the discussion which took place in the meeting, Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation. He did a splendid piece of work, we felt.

Besides that, as I say, he was liked by all of the members of the Vestry personally.

Q. Is it your testimony, Mr. Sheppard, that it was the intention of the Board of Directors to make Mr. Stanton a gift?

A. No question about it.

Frederick E. Hasler, who was the Chairman of the Standing Committee of the Vestry and a director of the operating company, and who voted for the resolution in both capacities, testified (R. 37):

Q. * * *

Could you possibly recall anything which you or any other member of the Board said at that time?

A. Yes, sir, we were all unanimous in wishing to make Mr. Stanton a gift.

Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard.

We understood that he was going in business for himself.

We felt he was entitled to that evidence of good will.

At the close of the trial, the district court entered a finding that the resolution "whereby a gratuity was

voted to the plaintiff * * in the amount of \$20,000 * * * constituted a gift (R. 60). The court of appeals, in an opinion by Judge Hand, with Judge Swan concurring and Judge Hincks dissenting, reversed (R. 82-89).

SUMMARY OF ARGUMENT

I

In the area represented by this case—voluntary payments by an employer to an employee or his family—there have been well over one hundred decisions in the lower courts, yet the principles governing decision remain unclear and uncertain. The reason, we believe, is that the “intent” test which the courts generally apply is not susceptible of being given meaningful content. The “intent” formulation came into the tax law only by uncritical reliance on a property law definition the irrelevance of which is now universally accepted, and with the rejection of that definition it must also fall.

II

A. It is our view that the only factual distinction that can be drawn among different kinds of voluntary payments is the difference in the reasons why they are made, *i.e.*, motive, and any useful definition of gifts must make the legal consequences, for tax purposes, turn on that distinction. It is our purpose in this brief to outline such a definition and examine its implications.

B. The definition of a gift we propose is a transfer of property motivated by personal, as distinguished

from business, reasons. "Personal" reasons include, of course, the motivations of affection, charity and the like that are usually associated with gifts, but it must be recognized that they can be limited neither to free-flowing nor to admirable motivations. Many, if indeed not most, admitted gifts spring rather from a sense of "duty"—to family, to society, to God—and the definition must equally include such motives as hate, vindictiveness, or self-aggrandizement. What such motives have in common is not their quality; or even the lack of compulsion, but the fact that they are "personal" to the payor in the sense that they arise from his relationship as a human being to others, to society, or to God. In the end, they can be usefully defined only by excluding "business" reasons.

"Business" reasons comprise any reason that establishes a proximate causal relationship between the payment and the performance of services, the conduct of a business, or the production of income. "Proximate" implies a standard broadly equivalent to the accounting concepts governing the propriety of charging a payment as a "cost" of the business, and can be made most concrete by identifying it with the degree of relationship necessary to justify a business deduction. In short, if a payment is sufficiently related to the business to be a proper charge against the business profits for tax purposes, then it ought equally to be deemed sufficiently related not to qualify as a gift. It is only the standard of causal relationship that is the same, however, and it makes no difference whether the particular payor claimed a deduc-

tion or whether, for some other reason, the payor would not be entitled to it.

That definition conforms to the substantial underlying considerations that can be perceived in the decided cases and is fully supported by the statute, provides a workable and easily-applied principle, and is consistent with the decisions of this Court.

C. The statute, which seems rarely to have been examined in this area, indicates both that Congress had in mind only essentially "personal" transfers and that it could not have intended to exclude payments of a kind that would be deductible by the payor.

The exclusion applies to "property acquired by gift, bequest, devise, or inheritance." Transfers at death are, of course, primarily intra-family matters and are uniquely "personal" even extended beyond the family. "Gifts" included in the same category reflect the same kind of transfer accomplished *inter vivos*, and there is no reason to think that Congress intended also to exempt a whole range of "business" transfers. That inference is also supported by the interrelationship of the income, gift, and estate taxes. Corporations are not subject to the gift tax, and if corporations can make gifts—i.e., if a payment made for a business reason can be a gift—it means such transfers are subject to neither tax.

Even stronger is the evidence that Congress did not intend to permit "deductible gifts". The result of a deductible gift is that income that would have been taxed to the payor but for the transfer is never taxed. Congress was at pains, however, to prevent that result,

as is evidenced both by the exception from the gift exclusion of gifts "of income" and the basis provisions assuring that any unrealized appreciation at the date of the gift will ultimately be taxed to someone. A construction of the gift exclusion which permits exclusion of payments the payor may deduct is fundamentally inconsistent with the statutory design.

D. Since the funds of a corporation ordinarily cannot properly be expended for the sort of personal reasons essential to a gift, the presumption that the directors did not commit a breach of trust by expending corporate funds for personal purposes ordinarily resolves the question of fact whether a corporate payment was made for personal reasons. And, since virtually all the litigated cases have involved payments by corporations, the definition of gift proposed by the Government would resolve most of the cases almost automatically. A question of fact as to the reasons for the payment would be raised only by the rare case in which the recipient contended, in effect, that his benefactors had committed a breach of trust.

E. More difficult, but less important as a practical matter, are the factual issues posed by payments by individuals. If nothing else, however, a great contribution is made simply by clarifying what it is that the trier of fact is to look for.

III

A. The essential elements of the formulation urged here are directly supported by this Court's most recent decisions in this area, *Robertson v. United States*, 343 U.S. 711, and particular *Commissioner v. LoBue*,

351 U.S. 243. As we show in our *Duberstein* brief, *LoBue* seems clearly to reject "intention" as the dividing line between gifts and income and to establish that the reason why a payment is made is the only relevant inquiry. So also, it made clear that a payment made for a business reason could not be a gift.

B. The opinion that seems most inconsistent with the approach later adopted by the Court is *Helvering v. American Dental Co.*, 318 U.S. 322, holding a cancellation of indebtedness, admittedly made for business reasons, to be a gift, and defining a gift as simply "the receipt of financial advantages gratuitously." That decision, however, has already been substantially overruled by *LoBue*, *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, and *Commissioner v. Jacobson*, 336 U.S. 28.

C. The difficulty that *Bogardus v. Commissioner*, 302 U.S. 34, seems to have caused in the lower courts is due not to its holding but only to the Court's unguarded use of the language of "intent" when its own analysis seems clearly to have turned on "motive." Properly understood, both the majority and dissenting views in that case—their disagreement being only over the scope of review, not the substantive definitions—can be readily reconciled with the later decisions of the Court and the definition of gifts urged here.

IV

If our definition of gifts be correct, no difficulty is posed by its application to this case. The only reason for which the vestrymen could properly have paid

funds of the church, dedicated to religious purposes, to petitioner was as a just reward for his past services. Unless it is to be contended that they committed a breach of trust by giving church assets to a personal friend—which of course is not contended—the fact that they may also have liked petitioner is totally irrelevant. When using church funds, they act for the church, not for themselves, and the only reason relevant here is the reason which justified the use of the church funds. And if reward for services was the reason for the “gratuity”, it cannot be a gift. Not being a gift, it necessarily is, on the facts here, compensation, no matter how sincerely and genuinely the vestrymen “intended” to make a gift not taxable to petitioner.

ARGUMENT

I

INTRODUCTION—THE NEED FOR CLARIFICATION OF THE LEGAL TEST FOR DISTINGUISHING BETWEEN GIFTS AND INCOME

It is in the area represented by this case—voluntary payments by an employer to a present or former officer or employee, his estate, or his family—that the great bulk of federal tax litigation over the distinction between gifts and income has taken place. Beginning with 1 B.T.A. 1 (*Parrott v. Commissioner*), there have been well over a hundred decisions dealing with the problem. Their failure in developing clear and meaningful guiding principles, however, is demonstrated by the most recent of all, *United States v. Allinger*, decided by the Court of Appeals

for the Sixth Circuit on March 3, 1960 (set forth in Appendix B, *infra*, pp. 91-94).

In *Allinger*, the two principal officers and stockholders of a corporation owned almost entirely by their two families agreed with each other that, upon the death of either, the corporation would pay a year's salary to his widow. Upon the death of one, the board of directors adopted a resolution confirming the agreement and resolving that "in consideration for past services" the corporation would pay a year's salary to the widow. The widow of the deceased officer thereupon received \$35,000. The district court found the payment to be a gift, and the court of appeals affirmed, noting that the widow was not required to perform any services and saying (*infra*, pp. 93-94):

"The question presented is one of fact. Whether the payment was a gift or taxable income * * * depends upon the intention of the parties, particularly that of the donor. The intent of the donor is to be determined from a consideration of all the facts and circumstances surrounding the payment." *U.S. v. Bankston*, 254 F. 2d 541 (C.A. 6). Intention must govern. *Bogardus v. Com. of Internal Rev.*, 302 U.S. 34, 43.

There are many cases on the subject but the thread running through all of them is that each case must be judged upon its own merits. There is no exact standard of measurement. The court must consider the peculiar facts of each case and determine whether from them an intention to make a gift is manifested and

if the facts logically and reasonably support such a conclusion. See the following cases: *Commissioner of Internal Revenue v. Jacobson*, 336 U.S. 28, 51; *Bounds v. United States*, 262 F. 2d 876, 884 (C.A. 4); *Peters v. Smith*, 221 F. 2d 721 (C.A. 3).

The Trial Judge made a careful comprehensive "findings of fact" and drew his inferences and conclusions therefrom. He had an opportunity to observe the witnesses and form a judgment of their sincerity, honesty and intentions not available to a reviewing court. We are of the opinion that the facts as found warrant the conclusions and inferences which he drew from them. Under Rule 52(a) F.R.C.P. we are not to disturb those "findings" unless clearly erroneous.

It is fair to say that the quoted opinion is typical of the approach widely followed in the lower courts, which while stating the question to be one of fact does not illumine which facts are or are not significant in resolving the question. Because the decisions by and large are limited to a recitation of the evidentiary facts and a conclusory "inference" that the payment was either intended or not intended as a gift, the full scope of the problem can be seen only by scanning the results of the cases. Rather than attempt to summarize them here, we have included in Appendix C brief summaries of a comprehensive, but not all-inclusive, group of the decisions. Our purpose here will be only to show how that lack of meaningful principles has come about.

A. THE INTENT FORMULATION OF THE GIFT ISSUE, WHICH HAS ONLY PRODUCED CONFUSION, WAS UNCRITICALLY TAKEN FROM THE PROPERTY LAW AND HAS NO MEANINGFUL UTILITY FOR DIFFERENTIATING BETWEEN THOSE "GIFTS" IN THE PROPERTY-LAW SENSE WHICH ARE TAXABLE RECEIPTS OF INCOME AND THOSE WHICH ARE NOT

The basic reason for the present unsatisfactory state of the lower-court law, we believe, is that the "intent" test by which the courts have sought to resolve the cases is simply not susceptible of being given meaningful content. We have tried to show that lack of content in our *Duberstein* brief (No. 376, pp. 9-12), and will not repeat it here. Our purpose here is to show that even in its origin the rule was never sought to be justified, and was adopted only through an uncritical borrowing of the concept from an irrelevant context while at the same time necessarily divorcing it from its original meaning.

1. *The property law definition of gifts is irrelevant for tax purposes*

1. That an effective transfer of property by gift requires a delivery, an intention to convey title (donative intent), and an acceptance by the donee is elementary, but there is one common law case, *Gray v. Barton*, 55 N.Y. 68, that has had such a particular significance that it is well to begin with it. There, Gray, admittedly intending to make a gift, purported to cancel an indebtedness owed him by Barton by giving to Barton, in exchange for one dollar, a receipt for "one dollar, in full, to balance all book accounts." Later, however, Gray sued Barton on the debt, claiming that part payment of the debt was not

consideration for a discharge of the whole and the purported cancellation was ineffective. The court held that, although there was no consideration to support an executory transaction, the delivery of the receipt was an adequate delivery to effect a completed gift of the debt, there being no doubt that a gift was intended. In the course of its opinion, the court said (p. 72):

A gift may be defined as a voluntary transfer of his property by one to another, without any consideration or compensation therefor. To make it valid, the transfer must be executed, for the reason that, there being no consideration therefor, no action will lie to enforce it. To consummate a gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter, with intent to transfer the title to him.

2. Since in virtually all of the litigated income tax cases there has admittedly been an effective transfer of property without consideration in the common law sense, it is evident that if that definition of a "gift" were adopted for tax purposes, there would be no issue and all "voluntary" and "gratuitous" payments would be exempt as "gifts." If one thing is clear, however, it is that that is not the rule. Rather it was assumed even before the dictum in *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730, and since then has been universally regarded as settled, that a payment made without obligation and not in exchange for a bargained-for consideration is not nec-

essarily a "gift" for tax purposes and may be compensation.*

To complete the showing of the irrelevance of the property law definition of gifts, it is necessary only to add that the converse is also true, namely, that even the presence of consideration in the common law sense does not necessarily preclude a transfer from being a gift for tax purposes. For example, while nominal consideration might be sufficient to make a contract enforceable, the transaction might still qualify as an excludible gift. A man may contract with his grandson to pay his tuition if the latter will agree to go to college. The existence of common-law consideration does not preclude the characterization, for tax purposes, of a gift.

In short, it is apparent that the fact that there has been an effective voluntary transfer of property, intended as such—i.e., a property law "gift"—only creates the tax question and does not answer it. Necessarily, therefore, to answer the tax question, reference must be made to some other source than the property law definition.

* Virtually every case cited in this brief starts with that assumption. For express statements, see, e.g.: *Fisher v. Commissioner*, 59 F. 2d 192 (C.A. 2); *Lunaford v. Commissioner*, 62 F. 2d 740 (C.A. 6); *Bass v. Hawley*, 62 F. 2d 721 (C.A. 5); *Levey v. Helvering*, 68 F. 2d 401 (C.A.D.C.); *Poorman v. Commissioner*, 131 F. 2d 946 (C.A. 9); *Nickelsburg v. Commissioner*, 154 F. 2d 70 (C.A. 2); *Bausch's Estate v. Commissioner*, 186 F. 2d 313 (C.A. 2); *Webber v. Commissioner*, 219 F. 2d 834 (C.A. 10); *Peters v. Smith*, 221 F. 2d 721 (C.A. 3); *Neville v. Brodrick*, 235 F. 2d 263 (C.A. 10); *Simpson v. United States*, 261 F. 2d 497 (C.A. 7); *Bounds v. United States*, 262 F. 2d 876 (C.A. 4); *Willkie v. Commissioner*, 127 F. 2d 953 (C.A. 6).

2. *The tax definition generally used was taken directly from the property law definition*

1. One of the earliest cases showing how the property-law definition of a gift, although itself irrelevant, was made to do service to make the tax distinction is *Daly v. Commissioner*, 3 B.T.A. 1042. There, the president of a corporation having become incapacitated by illness, the board of directors (consisting of the president himself and one other director) resolved to pay him "gifts" totalling \$72,000 in two years. The payments were charged to surplus and were not deducted by the corporation on its tax returns. The payments were held to be nontaxable gifts to the president, the Board reasoning (p. 1044):

* * * A gift has been judicially defined as "a valid transfer of his property from one to another without consideration or compensation therefor." *Gray v. Barton*, 55 N.Y. 68. The essential elements of a gift are an intention to give, a transfer of title or delivery, and an acceptance by the donee. Reviewing the evidence in this appeal, we find an actual delivery of the property and the acceptance by the donee. The intention may be ascertained from the resolutions of the board of directors and the subsequent treatment of the payments by the corporation. The three resolutions specifically designate the payments as "gifts," and the amounts thereof were posted in the corporate books to either the "profits" account or the "surplus" account, and were not treated as an operating expense of the business. This consistency of treatment was carried into the Federal tax returns * * *, wherein the amounts

were not claimed as a deduction from gross income. * * * Viewing the evidence in the light of what we deem to be the essential characteristics of a gift, we are led to the conclusion that the payments to the decedent were gifts and should not therefore be included in his gross income for the years in question.

The Board distinguished two earlier cases on the ground that in them "one of the essential elements of a gift, namely, the intention to give," was "negated by the treatment of the payments by the corporations as compensation for services and therefore as deductible items" (p. 1045).

In *Daly*, as in the other cases, it is clear that there was no more question about the "intention to give" in the property law sense than there was about "delivery" and "acceptance"; admittedly the transfer was valid for property law purposes. Thus the Board simultaneously, and apparently unwittingly, rejected the property law definition but borrowed its words, giving to them some entirely new and undefined meaning.

What *Daly* seemed to mean by an "intention to give" was simply a desire that the payment be treated as a gift for tax purposes, for the facts relied on reflect nothing else. And, indeed, as we show in *Duberstein* (pp. 9-12), that seems the only tangible meaning "intention" as so used can have. As might be expected, however, when that meaning was squarely put to the courts, it was squarely rejected—in cases holding payments not to be gifts even though admittedly the payor had done everything in his power to.

treat them as gifts. *E.g., Levey v. Helvering*, 68 F. 2d 401 (C.A.D.C.); *Nickelsburg v. Commissioner*, 154 F. 2d 70 (C.A. 2); *Wallace v. Commissioner*, 219 F. 2d 855 (C.A. 5); *Thomas v. Commissioner*, 135 F. 2d 378 (C.A. 5). And in due course the Board of Tax Appeals expressly overruled *Daly*. *Van Sicklen v. Commissioner*, 33 B.T.A. 544; see also *Laurie v. Commissioner*, 12 T.C. 86; *Walker v. Commissioner*, 25 T.C. 832; *Silverman v. Commissioner*, 28 T.C. 1061. Since the very essence of "intent" would seem to be the power of choice, the recognition in those cases that the payor ought not be allowed to choose the tax consequences should have made clear that the fault lay with the "intent" test; instead, most courts continued to use the verbalization of "intent" but removed it a final step away from substantive content by saying that it was the payor's "real" intent, and not his "words", that was controlling.

2. Perhaps the major source of the interjection of property law concepts into the tax definition is *Noel v. Parrott*, 15 F. 2d 669 (C.A. 4). There, the board of directors, anticipating a sale of the stock and the consequent displacement of the incumbent officers, made a "gratuitous appropriation" of some \$146,000 for distribution among the officers by the executive committee as it deemed "wise and proper." In holding the payments made pursuant to the resolution to be taxable, the court (per Parker, J.) said (p. 671):

* * * A gift is a voluntary transfer of his property by one to another, without any consideration or compensation therefor. *Gray v.*

Barton, 55 N.Y. 68 * * *; Curriden v. Chandler, 79 N.H. 269 * * *. Although it is held that the motive accompanying a gift is not material, gifts usually proceed from the generosity of the giver; and, where there is any doubt as to the nature of the transaction, the absence of such motive is a pertinent circumstance for consideration. It is an essential characteristic of a gift, however, that it be a transfer without consideration. If there is a consideration for the transaction, it is not a gift. 28 C.J. 621. * * *

The court then held, *inter alia*, that the wording of the resolution:

negatives the idea that a gift was intended; for the distribution was to be made to those who had rendered services to the company; i.e., to those from whom the company had received a consideration in the past. It was to be made as the executive committee might deem wise and proper; i.e., in accordance with the interests of the corporation and the deserts of the persons to be benefited by the distribution. The distribution was thus to be in the nature of a bonus, which "is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given." Kenicott v. Wayne County, 16 Wall. 452, 471; Payne v. United States, 269 F. 872. * * * And that this interpretation was the one intended is shown by the subsequent action of the corporation in claiming the disbursements made under the resolution as salary deduction from gross income.

The court concluded, finally, that the payment to the officers "was not without consideration, as in case of a gift. The consideration was their previous service to the company * * *" (p. 672).

If the considerations underlying the decision in *Parrott* be looked^o to, it is a sound decision based on sound grounds. The basis for the decision was essentially that the past services provided the only reason for the payment—i.e., the payments were motivated by the services. Unfortunately, however, in forcing its decision into the mold of contract and property law concepts, taken from *Gray v. Barton* and *Corpus Juris*, the court was led virtually to deny the very basis for its own decision—i.e., in its statement that "the motive accompanying a gift is not material." And its assertion that the past services were "consideration" for the payment—which they clearly were not in the contract law sense of a bargained-for exchange creating an enforceable obligation—has led simply to another question-begging formulation. The question is, what causal relationship, short of a contractual obligation, must be established between the services and the payment to justify the legal characterization that the one is "for" the other. And, finally, the reliance on the fact that the corporation deducted the payment provided a ready basis for what is an irrelevant distinction.

Though the actual decision was inherently sound, *Parrott*, because of the failure to express accurately the underlying considerations, failed to be of significant precedential value, as is shown by *Blair v.*

Rosseter, 33 F. 2d 286 (C.A. 9), decided shortly thereafter. There, the president of the Sperry Flour Company was voted at the annual stockholders' meeting \$50,000 "as a gift in recognition of" his able services over the past ten years. The corporation charged the payment to surplus and did not deduct it on its tax return. The Board of Tax Appeals said that whether the payment was a gift depended "upon the intention of the parties and the facts and circumstances surrounding the transaction" and found that the resolution was "clear and conclusive" evidence of "the intention to make a gift" (*Rosseter v. Commissioner*, 12 B.T.A. 254, 255-256). The court of appeals affirmed, saying (33 F. 2d at pp. 286-287):

A gift is generally defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor. 28 C.J. 620. The payment here in controversy was denominated a gift by both stockholders and directors; it was without consideration or compensation, and we think it must be conceded that it has all the earmarks of a gift or windfall. The Commissioner seems to contend that there was a consideration for the payment, but manifestly an agreement on the part of a corporation to pay additional compensation to its president for services performed over a period of ten years for which he had already been fully compensated is without consideration and void. *Alaska Packers' Ass'n v. Domenico* (C.C.A.) 117 F. 99.

To the contention that the case was controlled by *Parrott*, the court said that the cases "have little in

common," since in *Parrott* the corporation "treated the payments as salaries, not as gifts," and deducted them on its tax return (p. 287).

We have tried to show why it is that many decisions of the lower courts have failed to evolve any meaningful standards for determining when a payment is a gift, with a consequent contrariety of results that cannot be reconciled. The basic reason, we believe, is the formulation of the issue as one of "intent," a term which, when divorced from its property law meaning of a purpose to convey title, has no relevant meaning in the income vs. gift context. As we show in our brief in *Duberstein* (pp. 9-12), the only possible substantive content of the term as used by the courts is the desire of the payor that the payment have specified tax consequences, yet the unacceptability of allowing the payor to specify the tax consequences has been vigorously asserted by every court that expressly acknowledged that possible meaning. In short, all would agree that whether a payment is taxable income or an excludible gift should not be controlled by the payor's declaration: "I desire (or do not desire) that this be taxable." The "intent" formulation—and its cousin, the absence of "consideration"—being the source of the difficulty, the

‘In none of the cases is there “consideration” in the contract law sense of a bargained-for exchange giving rise to an enforceable obligation. Whether the past services are deemed “consideration” for a voluntary payment seems to turn on whether the payment is “intended” to “pay for” the services, with the result that the “intent” test and the “consideration” test are one and the same.

essential first step to giving meaning to the gift definition is to abandon that formulation.

II

GIFTS SHOULD BE DEFINED AS TRANSFERS OF PROPERTY MADE FOR PERSONAL AS DISTINGUISHED FROM BUSINESS REASONS, A DEFINITION FULLY SUPPORTED BY THE STATUTE AND OF SIMPLE APPLICATION

A. INTRODUCTION

1. As we have tried to show in our *Duberstein* brief (pp. 13-15), the only factual distinction that can meaningfully be drawn between different kinds of voluntary payments is the difference in the reasons why they are made, i.e., motive, and it is in terms of that difference, therefore, that any legal distinction must ultimately be made. While at first sight that may seem merely a substitution of one ambiguous word for another, the terms "intent" and "motive," properly used, have very different meanings. "Intent" answers the question "What?"; "motive," the question "Why?" Perhaps the difference most apparent is the difference in the payor's power of choice. "Intent" is an act of will and necessarily implies the power of choice; one can "intend" whatever one wants. That is why, if "intent" were really controlling in these cases, it would have to mean that the payor could "choose" the tax consequences. "Motive," on the other hand, is the inducing cause and is beyond the control of the payor; while the payor is free to decide whether to make the payment, he cannot, by any choice of words, alter the reasons that in

fact caused him to make the decision. In short, "intent" is a matter of choice; "motive," a matter of causation.

Our position is not, it should be emphasized, that "motive" is simply a better test than "intent." It is rather that "intent" is no test at all and that the distinction in "motives" is, as a matter of strict analysis, what actually distinguishes between those voluntary payments which are treated as gifts for tax purposes and those which are not. In none of the cases is there any question about *what* was intended to be given—the property transferred remains the same whether it be a gift or compensation for tax purposes—and the only thing else that can be learned about the transaction is *why* it was given. In short, we urge the "motive" formulation upon the Court not as a matter of preference but as a matter of logical necessity.

Logical necessity, however, carries the inquiry no further than focusing upon motive as the distinguishing fact. The problem remains to define the legal consequences that follow from given motives—*i.e.*, which motives qualify the payment as a gift and which do not. Our purpose in this Point is to answer that question and to show how, from the decided cases and the statute, there can be pieced together a formulation in terms of motive that provides an easily-applied principle to resolve the troublesome gift-income problem.

2. That virtually all the cases have stated the issue as one of "intent" does not mean that, in re-

jecting that formulation, all the learning on the nature of a gift must be rejected. Through the veil of the "intent" language used by the courts are discernible basic underlying considerations which the courts have almost intuitively felt should govern the tax results. The problem is simply to put the elements that can be drawn from the cases together in a new formulation in which their significance is expressly recognized and articulated. We do not mean to imply by that that the results of the cases can be reconciled. To the extent that the particular results turned upon an attempt literally to apply the "intent" test, the results will fall with the test. Our point is simply that, notwithstanding the rejection of the verbal formulation of the cases, and frequently their results, there can still be found guides in the cases for the development of a new formulation put in the more meaningful framework of "motives."

In particular, putting aside the verbal formulation in the cases, we submit that there will be found to be substantial agreement on at least the following propositions:

(1) That the lack of a legal or moral obligation on the part of the "donor" does not by itself make the payment a gift. That proposition is universally accepted. See note 2, *supra*.

(2) That the gift question turns upon some aspect of the payor's action and must be viewed from the payor's, not the payee's, point of view. That of course is the essential assumption of the intent test itself, and is the basic distinction between the "gift" problem and

the "income" problem. By and large, it can be said that the determination whether a payment is a "gift" within § 22(b)(3) must be made from the payor's vantage point; whether it is "income" within § 22(a), from the payee's. The only dichotomy with which we are directly concerned here is between gifts and non-gifts, and from the fact that a payment is not a gift it does not follow *necessarily* (though usually, as here, there is no question about it) that it is income. The distinction of the problems is important to analysis. The fact, for example, that the recipient of a payment has done nothing for it means by itself only that to him it is a "windfall" and raises only the question whether windfalls are income within § 22(a). To determine whether the payment is a gift, as even the intent test assumes, it is necessary to look to what the payor did and why. The few cases—primarily the advertising give-away cases—that look only to what the recipient has done are thus, to the extent that they state the question as one of "gift" rather than "income", inconsistent with the very premise of the great bulk of the "gift" cases (i.e., that it is the donor's intent that controls), and they can better be explained as turning on the "income" question, though without a careful distinction being made between the two problems.⁵

⁵ The leading advertising give-away cases were decided before *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, at a time when the view was widely held (based upon the language in *Eisner v. Macomber*, 252 U.S. 189, 207) that a pure windfall was not income. Thus the question whether a payment was truly a "gift" or simply a "windfall" was of little significance

3. That payments by an employer to an employee, even though voluntary, ought, by and large, to be taxable. That is evident in the frequently reiterated "presumption" that payments by employers to employees are compensation.

4. That the concept of a gift is inconsistent with the payment being a deductible business expense. That appears in the almost universal reliance (except in the widow bonus cases, where the departure is explicable by their peculiar history⁶) on the fact that the payor deducted the payment as "evidence" that a

and there was little reason for the courts to separate the problems. *Glenn v. Bates*, 217 F. 2d 535 (C.A. 6); *Washburn v. Commissioner*, 5 T.C. 1333. The post-*Glenshaw* decisions simply followed the earlier ones seemingly without awareness that the holding of *Glenshaw* that windfalls are income made it essential to re-analyze those cases. *Compeau v. Commissioner*, 24 T.C. 370; *Fernandez v. Fahs*, 144 F. Supp. 630 (S.D. Fla.). The cases are stated at pp. 107-108, *infra*.

⁶ The Government bears the primary responsibility. The Treasury Regulations have, since 1918, allowed an employer to deduct reasonable payments to a deceased employee's widow. *E.g.*, Regs. 94, § 23(a)-9; Regs. 118, § 39.23(a)-9; Regulations under the Internal Revenue Code of 1954, § 1.401(a)-12. In 1939, the Commissioner issued a ruling that such payments were not only deductible but were gifts to the widow, since allowances "paid by an organization to which the recipient has rendered no services" are gifts. I.T. 3329, 1939-2 Cum. Bull. 153. The first "widow-bonus" case, *Aprill v. Commissioner*, 13 T.C. 707, arose while that ruling was still outstanding. There the widow of the president of a corporation, having herself inherited his 75% of the stock and become president and a director, joined with the other two directors in voting herself \$36,000 "in recognition of the services" rendered by her late husband, which payment the corporation deducted. The Tax Court took the Commissioner at his word and found that the corporation, having followed I.T. 3329 to the letter, "intended" a gift; the deduction was not contrary evidence since the I.T. allowed it. Shortly there-

gift was not "intended"—a fact the probative value of which, if any, depends upon an assumption of mutual inconsistency.

5. That a gift involves such personal elements as affection, good will, regard, or sympathy, and a purely "business" transaction ought not be exempt as a gift. Although difficult to fit into the "intent" rationale (other than by such an awkward formulation as an intent "to show" those feelings), mention of such elements appears frequently in the lower court cases and, as we shall show, almost invariably in this Court's decisions.

6. That a business corporation cannot properly make a "gift" of its assets. Although difficult to square with the "intent" formulation—there is no reason why a corporation, having decided to make a payment for proper corporate reasons, cannot intend it in such a way as to lessen the recipient's tax burden and thus make a smaller payment serve the same

after, the Commissioner revoked I.T. 3329, pointing out that it had misconstrued a provision of the regulations treating as a gift a payment made "by one to whom no services have been rendered" (Regs. 111, § 29.22(a)-2), under which it was irrelevant *by whom* the services were rendered. I.T. 4027, 1950-2 Cum. Bull. 9. When the new I.T. got to the Tax Court, however, the court simply relied upon its prior decisions as controlling precedents, noting that the Commissioner "cannot by administrative ruling tax as ordinary income a payment which the payor made and intended as a gift." *Hellstrom v. Commissioner*, 24 T.C. 916 (\$33,600 paid to 35% stockholding widow of president). The *Hellstrom* decision, in turn, has provided the pattern for all the other widow-bonus cases. The cases are stated at pp. 103-107, *infra*.

Apart from the widow-bonus cases, the only decision that seems to accept the view that a deductible payment can be a gift is *Peters v. Smith*, 221 F. 2d 721, 725 n. 3 (C.A. 3), *infra*, pp. 101-102.

purpose—that view has been relied upon, as we shall show (*infra*, pp. 44-48), in over twenty decisions and has never been expressly challenged.

It is, we believe, unnecessary to add anything to those established ingredients in order to develop a sound principle for distinguishing between gifts and non-gifts. It is necessary only to provide for them a meaningful framework and explicitly to rationalize their relevance in terms of the statutory purpose.

We will begin the analysis in reverse order, simply asserting at the outset the definition of gifts that we propose and then showing how that definition conforms to the felt concepts of the decided cases and is directly supported by statute. We will show, finally, how the application of that definition will rarely involve any disputed issue of fact and will almost automatically dispose of the great bulk of the "gift" cases.

B. A GIFT MAY BE DEFINED AS A TRANSFER OF PROPERTY MOTIVATED BY PERSONAL, AS DISTINGUISHED FROM BUSINESS, REASONS

The correct definition of a gift, we submit, is a transfer of property motivated by personal, as distinguished from business, reasons. Since we include within "personal" reasons everything that is not comprehended by "business" reasons, the controlling definition is that of "business" reasons. We shall begin, however, by showing affirmatively the necessarily broad and undefinable scope of "personal" reasons, and then define "business" reasons.

1. The concept of a gift most frequently alluded to in the cases is that of a manifestation of a free and

unrestrained generosity induced by such motivations as affection, compassion, altruism and the like. The idea, however, is necessarily broader than that, and can be limited neither to free-flowing generosity nor to "good" motivations. It is apparent that many admitted gifts are prompted less by a freely-formed "desire" than by a sense of duty, perhaps enforced by social pressures—*e.g.*, a duty to one's family (providing for a disliked but needy relative), a duty to society (contributing annually to charity), or a duty to God (tithes). It must be acknowledged also that gifts can be made for quite unworthy motives—*e.g.*, hate, spite, lust, vindictiveness, or self-aggrandizement. Ultimately, the only thing that such motives have in common is not their quality but the fact that they are "personal" to the payor in the sense that they arise, not from his income-producing activities, but from his "personal" relationship as a human being to his family, to his fellows, to his community, to his country, or to God. In the end, we submit, what is "personal" can usefully be defined only as that which has no relation (or no sufficient relation) to "business" activities. In short, "personal" reasons are those which are not "business" reasons.

2. By "business" reasons we mean any reason that establishes a "proximate" (an admittedly vague word that requires separate development, see pp. 31-32, 59-62, *infra*) causal relationship between the payment and the conduct of a business, the production of income, or the performance of services (*i.e.*, any "tax-significant" transaction). The definition does not require that the

payment be made for an anticipated benefit; it is enough that it be related to a past benefit. Suppose, for example, that an employer makes a payment to a retired employee or an employee's widow. It is not, under our definition, necessary to show that he did so to stimulate the good will of other employees or to obtain any other prospective benefit, or even that he felt that the employee had not been fully and fairly paid. It is enough if he was moved simply by the sense that it is fair and just that an employer, having reaped the benefits of the employee's productive years, should make some provision for the employee's old age or for his dependents. That is a sense of "obligation"—or "propriety," to avoid any restrictive meaning—the employer feels only because of the employment relationship and provides a direct causal relationship between the receipt of the services and the payment.

The troublesome point in the definition, of course, is what is meant by "proximate." Some such qualification must be made, however, to exclude, for example, the contribution made by a lawyer to a community venture with the hope that the attendant publicity will stimulate the payor's law business, or the kind of emotional response to the performance of services that we suggested in our brief in *Duberstein* (p. 17, n. 10). See also pp. 59-62, *infra*. The concept can be given concreteness, however, by identifying it with the more familiar concepts of business accounting. When the employee-pension case, for example, is put in the context of partnership, trust, or corporation accounting, the answer is immediately evident that it could properly

be treated as a "cost" of the business to be paid out of the business assets rather than out of the "personal" funds of the partner, the trustee, or the president. It is essentially that kind of relationship to the business we mean to imply by "business" reasons.

The standard can be given its greatest concreteness, however, simply by relating it to that already-established body of law defining the degree of relationship to the business necessary to justify a "business expense" deduction. That is, if the payment is sufficiently related to the business or the performance of services to be a proper charge against the business profits for tax purposes (if the other requirements for a business deduction are met), then it ought to be deemed to be sufficiently related not to qualify as a gift. The only aspect of the business expense definition that is relevant, of course, is that defining the necessary degree of relationship of the expenditure to the production of income. Since there may be other reasons why a deduction would not be allowable—*e.g.*, the payor is exempt or is not in a trade or business, or the payment is excessive—the question does not turn on whether the particular payment was deductible. And, of course, the *fact* that the payor did or did not claim a deduction ought have no more significance than it does when the deduction itself is challenged. The only relevance of the law of business expenses, in short, is that the same standards of business relationship should be applied for both purposes.

3. There is, we think, nothing novel about this definition of gifts other than the explicit rejection of the

futile search for "intent." It conforms fully to, and satisfies in precise degree, the felt considerations that we believe have influenced the courts, albeit through the barrier of the language of intent, in reaching decisions. The definition does not depend upon the existence of a legal or moral obligation; it does turn upon some aspect of the payor's conduct, through motive rather than intent; it articulates the causal relationship between services and payment that precludes a gift; it gives effect to the felt inconsistency of a deductible payment being a gift, but does so by making the definitions mutually exclusive rather than by giving the fact of deduction evidentiary value; it makes decisive the distinction between "personal" and "business" relationships suggested by such terms as affection, regard, or generosity, though it defines "personal" motives more comprehensively; and finally, as we shall develop in more detail below (pp. 40-56), it provides a tax definition of gifts that conforms to the reiterated view that a corporation cannot (though with some qualification) make a gift.

In short, it gives effect to all the substantial underlying considerations that one may discern from the decided cases, save only those elements peculiar to the "intent" test (the relevance of what the payor calls the payment, the fact that he deducted it, etc.) and those which confuse the "gift" issue and the "income" issue (the significance of the fact the payee performed no services). It remains to be seen only whether that definition can be supported by the statute; provides a workable principle; and can be reconciled with the decisions of this Court.

C. THE SUGGESTED DEFINITION OF GIFTS IS FULLY SUPPORTED, IF
NOT REQUIRED BY STATUTE

The suggested definition of gifts as transfers made for "personal" reasons, defined to exclude "business" reasons in the same sense that that term is used for deduction purposes, is, we believe, fully supported by the provisions of the Code dealing expressly with the tax treatment of gifts—namely, the exclusion provision and the provisions defining the basis of property acquired by gift. Those provisions, we think, have a double impact. They show not only that Congress thought of gifts as essentially family or "personal" transfers, but they make clear that Congress could not have intended to exempt as gifts payments of a kind that would be deductible by the payor.

1. That Congress thought of gifts as personally-motivated transfers is evident, we submit, from no more than its assimilation of gifts to transfers at death. Section 22(b)(3) excludes from income "property acquired by gift, bequest, devise, or inheritance." Bequests, devises, and inheritances, it is obvious, involve primarily intra-family transfers of wealth; and even extended beyond blood lines, as the exclusion of course must be, they are dispositions made for uniquely "personal" reasons. In excluding such transfers at death from income, it was necessary, to be consistent, to exclude the same kind of transfers when accomplished *inter vivos*. Thus from the exemption of "gifts" there is no reason to think that Congress had in mind any types of transfers essentially different in kind from bequests. To the contrary, from the fact that gifts were included in the same category

as transfers at death—literally, in fact, “gift, bequest, devise, or inheritance” are enumerated simply as alternative mechanisms “by” which property is acquired—it ought to be inferred that the sole purpose was to avoid discrimination against *inter vivos* transfers of like character, and not to permit a whole range of “business” transfers to escape taxation. In short, the exclusion of gifts should be limited to *inter vivos* transfers serving the same function and made for the same reasons as transfers at death—namely, those made for uniquely “personal” reasons.

Support for that inference can also be drawn from the interrelationship of the income, gift, and estate taxes. The exemption of gifts *inter vivos* or at death from the income tax reflects a judgment that such essentially intra-family transfers of wealth ought to be taxed under a special scheme tailored to such transfers (the gift and estate taxes) rather than be subjected to the general income tax. Corporations, however, have never been subject to the gift tax, and the explanation must be either that Congress was wide of the mark in the attempt to correlate the two systems of tax—leaving a great class of transfers subject neither to the income tax nor the gift tax—or that it thought of gifts as transfers being made for such “personal” reasons that a corporation could not make a gift. The explanation given by Congress was the latter; it explained the limitation of the gift tax to individuals on the ground that a gift “by a corporation * * * would constitute a gift from the stockholders of the corporation.” H. Rep. 708, 72d Cong., 1st Sess., pp. 27-28; S. Rep. 665, 72d Cong., 1st

Sess., p. 39. Since corporations obviously can make voluntary payments in their own behalf for business reasons, and the only thing they lack is "personal" motivation, the necessary assumption of Congress was that payments made for business reasons are not "gifts".

2. Even clearer, we think, is the evidence that Congress did not intend to exclude as gifts payments of a kind that would be deductible by the payor—that is, that "gifts" must be defined in a way that excludes deductible business expenses.

The effect of a non-exclusive definition of gifts and business expenses, it is clear, would be to allow what would otherwise be taxable income (*i.e.*, but for the transfer from one taxpayer to another) to escape taxation altogether. A deductible payment, since it reduces the income otherwise taxable to the payor, in effect comes "out of" of the payor's income. If, in turn, the payment is treated as a "gift" to the payee, the result is that the income is taxable neither to the payor nor to the payee. That is, simply by virtue of the payment from one taxpayer to another, the total income taxable to the two taxpayers is reduced by the full amount of the payment.

The justification for exempting gifts and devises from the income tax may be mooted, but surely at least one element of the policy is the idea that such transfers result only in the shifting, not the augmentation, of wealth and thus do not constitute "income" in

¹ Even so, the statement that a corporation cannot make a gift other than on behalf of its stockholders must be somewhat qualified (see pp. 50-56, *infra*).

the economic sense. That leads, however, only to the conclusion that such a transfer ought not be treated as an "income-creating" transaction, and a construction of the exclusion that permits it to be used to destroy what would *otherwise* be taxable income corrupts its basic purpose. We are not left, however, with that general policy inference, for there are two specific provisions that make clear Congress' concern that income not be allowed to escape taxation by means of the exclusion.

a. Section 22(b)(3) does not stop with the sentence excluding gifts and devises from income; it goes on to provide:

* * * There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. * * *

That provision was, of course, specifically concerned with such transfers as a gift of an income interest in a trust, and we do not contend that a deductible gift would be a gift "of income" within the literal meaning of that provision. A deductible gift obtains its "income" characterization only by virtue of its deduction from the payor's income and is not intrinsically a gift of an "income" item in the sense Congress had in mind. It is evident, however, that a deductible gift produces precisely the same substantive evil as would a nontaxable gift "of income"—the disappearance of income as the result of the gift. We cannot believe that Congress intended to allow by the first sentence of the section a result that it so as-

siduously sought to avoid in the second. The two sentences can be reconciled in purpose only by defining gifts as excluding business expenses.

b. The second provision that shows Congress' concern that the gift exclusion not be a valve through which otherwise taxable income can escape taxation is § 113(a)(2), which gives to property acquired by gift the same basis in the hands of the donee that it had in the hands of the donor (with an exception not here relevant). The effect is to assure that any unrealized appreciation in the value of the property on the date of the gift does not escape taxation by virtue of the gift but will ultimately be taxed to the donee upon his realization of it by a sale or exchange. Like the second sentence of § 22(b)(3), § 113(a)(2) makes clear the purpose of Congress to follow all "income" even through what is admittedly a gift transaction. If, while at pains to prevent even unrealized appreciation in a capital asset from escaping taxation by means of gift, Congress intended to allow deductible payments, in effect coming "out of" the ordinary business profits of the payer, to be excluded from the payee's income, it closed the windows but left open the door.

There is more than a mere policy inconsistency, however, between § 113(a)(2) and a definition of gifts that includes deductible payments. It can be shown, we think, that there is an irreconcilable logical inconsistency. Suppose that an employer buys a bearer bond for \$100 and makes a "gift" of it to an employee's widow, deducting the cost as a business expense, and that the widow immediately sells it for \$100. Assuming that the transfer was a true "gift" within

§ 22(b)(3), is it not clear that the widow is nevertheless fully taxable on a \$100 gain? She is required to take her donor's basis (§ 113(a)(2)), with all "adjustments" required for the period during which the property was held either by her or by her donor (§ 113(b)(2)). Her donor's basis was originally \$100, but he deducted that cost as a business expense when he gave the property to her, and that deduction requires an adjustment to basis (see § 113(b)(1)(A))—the very purpose of the basis-adjustment provisions is to prevent the same cost from being recovered tax-free more than once. Hence, her basis is zero, and upon the sale of the bond she realizes a fully taxable gain of \$100, being entitled to no capital gains deduction because the property was not held for six months. In short, the result of a deductible "gift", if the payee immediately "realizes" its value, is precisely the same as if it were not a gift but were itself treated as a taxable receipt!

But now suppose precisely the same transaction, except that the purchase and sale of the bearer bond is omitted, the widow simply being given the dollars to begin with. Surely there is no logical basis for the two transactions having different results—the parties have simply spared themselves the trouble of the washing-out purchase and sale of the bond. To be consistent, therefore, we would have to treat the dollars received by the widow as zero-basis dollars—their "basis" having been fully recovered by the payor's deduction—the face value of which is immediately "realized" upon receipt, producing a "gain" of \$100 which, since money is not a capital asset, is fully taxable regardless of the holding period. The effect, in

short, is that the "gift", though treated as a true gift, becomes a gift "of income", the dollars having been converted into an "income item" by virtue of their deduction. We grant the conceptual difficulties in that analysis—since money is ordinarily fully "realized" and accounted for at face value immediately upon receipt or disbursement, it rarely, if ever, has a basis different from its face value (or, what amounts to the same thing, it is seldom necessary to assign it a "basis")—but it demonstrates, we believe, the logical inconsistency inherent in the concept of a deductible "gift." The treatment of a deductible payment as an excludible "gift" simply cannot be rationalized with the underlying presuppositions of the other provisions of the Code governing the effects of gifts. If "gifts" are defined as including deductible payments, the exclusion and the donee-basis provisions work at cross-purposes, the one permitting income to escape taxation and the other being designed to prevent that very result. It is only by defining gifts so as to exclude any payment made for a "business" reason, and hence potentially deductible, that the several provisions can be made to work together.

D. SINCE THE FUNDS OF A CORPORATION ORDINARILY CANNOT PROPERLY BE EXPENDED FOR THE SORT OF PERSONAL REASONS ESSENTIAL TO A GIFT, THE PRESUMPTION THAT THE DIRECTORS DID NOT COMMIT A BREACH OF TRUST ORDINARILY RESOLVES THE QUESTION OF FACT WHETHER A CORPORATE PAYMENT WAS MADE FOR PERSONAL REASONS.

1. The lower courts have frequently said, though without specification of the kind of evidentiary fact

upon which the result turns, that whether a payment is a gift is a "question of fact." The treatment of the question as one of fact is a function, we believe, of the failure specifically to say what a gift is and the reliance on the essentially question-begging formulation that a payment is a gift if it was "intended" as a "gift." Our purpose in this section is to show that, once a gift has been clearly defined as a payment made for personal rather than business reasons, the basic fact upon which the definition turns—"Why was the payment made?"—will almost never be a matter of dispute.

The explanation is that virtually all the litigated cases have involved payments by corporations or similar entities, and in such cases the reason for the payment is established simply by the presumption that the officers or directors did not commit a breach of trust by distributing corporate assets for an improper reason. That presumption establishes *prima facie* that the payment was made for a reason—usually readily identifiable—for which the use of corporate funds would have been proper, and it is rare indeed that a recipient of a voluntary payment would undertake to challenge that presumption by proving, or even alleging, that the officers acted for a reason that would make the payment a breach of trust. In short, in almost every case, that reason which justifies the use of corporate funds must be accepted as the reason for which the payment was made, and there remains no factual issue to be resolved.

The presumption of the propriety of corporate acts only answers the factual question of why the pay-

ment was made. When the reason for the payment has been thus determined, there remains a logically separate step of applying the tax definition of gifts to that reason to determine whether the payment qualifies as a gift. The cases have generally not separated the two questions but have assumed that the corporation law rule that corporate officers cannot make "gifts" of corporate property—and should therefore be presumed not to have done so—answered the tax question. That assumes that the corporation law definition of "gifts" is the same as the tax definition—or, more precisely, that any proper corporate reason for a payment would necessarily be a "business" reason precluding its characterization as a gift for tax purposes. By and large, that is true, and in the context in which the statements were made—payments to officers or employees—we think the equivalence is self-evident. As we shall point out, however, there are some kinds of payments a corporation can make for other than "business" reasons in the tax sense, and the statement that a corporation can never make a gift for tax purposes requires some qualification. The cases to be discussed, therefore, should be read in the light of their context—payments to officers or employees—and not as stating an unfailing universal rule necessarily governing in other contexts.

So qualified, however, the cases establish three propositions which, when their implications are fully appreciated, would resolve virtually every one of the gift-income cases that have been thus far been litigated: (1) that corporate assets can properly be given to an officer or employee only for business reasons;

(2) that payments made to an officer or employee must be presumed to have been given for such reasons rather than by a breach of trust; and (3) that payments made for such reasons are not gifts for federal tax purposes. Those propositions would be equally applicable, of course, to payments to members of the officer's or employee's family (as in the widow-bonus cases) or to a business associate (as in *Duberstein*). If those propositions be accepted, therefore, the tax treatment of corporate payments to such persons would raise a question of fact only in that rare case in which the recipient contended, rather ungraciously,* that the officers, directors, or majority stockholders had violated their duty of loyalty and made use of the corporate assets for their own personal purposes, namely, to enrich an object of their bounty. In the absence of such a contention, the payments would not be gifts as a matter of law.

*Nor is that a matter only of taste, for proof that the corporate officer or stockholder had used corporate funds to make a personal gift, while exempting the recipient from tax, would mean that the officer was himself taxable on the moneys so appropriated by him to his own use (either as compensation, a dividend, or misappropriated funds, as the circumstances might warrant). In effect, the officer would be treated as having constructively received a distribution from the corporation of which he had then made a gift to the recipient. *Union Stock Farms v. Commissioner*, 265 F. 2d 712, 724-725 (C.A. 9); *Jolly's Motor Livery Co. v. Commissioner*, 1957 P-H Tax Ct. Mem. ¶57,231; *Lasker v. Commissioner*, 1952 P-H Tax Ct. Mem. ¶52,012; *Reichert v. Commissioner*, 19 T.C. 1027; see *Nelson v. Commissioner*, 203 F. 2d 1 (C.A. 6); cf. *Helvering v. Horst*, 311 U.S. 112.

*As to unanimous action by the stockholders, see pp. 48-50, *infra*.

2. It is, of course, firmly established as a matter of corporation law that in general neither the officers, the directors, nor the stockholders have authority to make gifts of corporate funds. As this Court, in holding that excessive bonuses paid corporate officers would constitute an actionable waste of corporate assets, stated in *Rogers v. Hill*, 289 U.S. 582, 591-592:

* * * The dissenting opinion of Judge Swan indicates the applicable rule: "If a bonus payment has no relation to the value of services for which it is given, it is in reality a gift in part and the majority stockholders have no power to give away corporate property against the protest of the minority." 60 F. (2d) 109, 113. * * *

New York, the domicile of the payor both here and in *Duberstein*, follows the general rule. *E.g.*, *Worthington v. Worthington*, 100 App. Div. 332, 91 N.Y. Supp. 443 (1st Dept.); *Holst v. New York Stock Exchange*, 252 App. Div. 233, 299 N.Y. Supp. 255 (3d Dept.); *Chadwick v. New York Stock Exchange*, 252 App. Div. 714, 299 N.Y. Supp. 256 (3d Dept.); see also, *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A. 2d 295.

The significance to the tax problem of the lack of corporate capacity to make gifts and of the presumption of the regularity of corporate acts was acknowledged at an early date (see *Parrott v. Commissioner*, 1 B.T.A. 1) and has never been expressly denied. The leading case is *Noel v. Parrott*, 15 F. 2d 669, 671

(C.A. 4), where, in holding taxable a "gratuitous appropriation" to corporate officers authorized by the board of directors, the court said:

* * * It needs neither argument nor citation of authority to establish the proposition that the directors were without authority to give away the corporate assets, and that for them to make to several of their members and other persons a gift of a large sum of money from the corporate assets * * * would amount to an illegal misapplication of corporate funds. We must assume that the directors did not intend such a flagrant violation of their trust. * * *

The premise of the rule was explained by the Third Circuit: "The corporate 'person' may be deemed by a fiction of the law to have abilities normally ascribed to man but that fiction cannot be indulged to the extent of endowing the corporation with ~~feelings~~ of love and affection for its stockholders, officers and directors." *Chandler v. Commissioner*, 119 F. 2d 623, 627-628. And in another case, in holding that a corporation's payment of the premiums on a life insurance policy in favor of an officer's wife and children was compensation to the officer, the Third Circuit found it unnecessary to consider any other facts or to say more than that the payments "must be presumed as compensation for services, rather than gifts * * * since a corporation cannot lawfully give away its assets." *Yuengling v. Commissioner*, 69 F. 2d 971, 972. The rule has been relied upon no fewer than eleven times

by the Tax Court,¹⁰ and has been endorsed by not only the Third and Fourth, and perhaps the Sixth,¹¹ but the Second, Eighth, Ninth, and District of Columbia Circuits, as well as by a district court in the First Circuit.¹² And in every case in which the principle was relied upon, the claim that the payment was a gift was rejected.

¹⁰ *Parrott v. Commissioner*, 1 B.T.A. 1; *Beatty's Estate v. Commissioner*, 7 B.T.A. 726; *Garey v. Commissioner*, 16 B.T.A. 274; *Landon v. Commissioner*, 16 B.T.A. 907; *Binger v. Commissioner*, 22 B.T.A. 111; *Wilcox v. Commissioner*, 27 B.T.A. 580; *Anderson v. Commissioner*, 31 B.T.A. 197; *Van Sicklen v. Commissioner*, 33 B.T.A. 544; *Walker v. Commissioner*, 25 T.C. 832; *Jackson v. Commissioner*, 25 T.C. 1106; and *Silverman v. Commissioner*, 28 T.C. 1061.

¹¹ In *Lunsford v. Commissioner*, 62 F. 2d 740 (C.A. 6), the court held that a \$50,000 "memento" given by a corporation, after a sale of its assets to another corporation, to the officer of the buying corporation with whom it had negotiated the sale was not taxable. It reasoned that since the recipient had performed no services for the payor, the authority of the officers of the payor to make the payment was irrelevant: the payment could not be compensation in any event, and if it was unauthorized it was subject to being recovered by the stockholders and thus not a gain. Those premises have of course since been definitively rejected—a gain is income whether or not it is compensation (*Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426) and whether or not there may be a potential liability to repay it (*United States v. Lewis*, 340 U.S. 590; *Rutkin v. United States*, 343 U.S. 130)—and the opinion is now perhaps most significant for its implicit acknowledgment of the principle that a corporation cannot make a gift to an employee.

¹² *Fisher v. Commissioner*, 59 F. 2d 192 (C.A. 2); *Commissioner v. Bonwit*, 87 F. 2d 764 (C.A. 2); *Fitch v. Helvering*, 70 F. 2d 583 (C.A. 8); *Botchford v. Commissioner*, 81 F. 2d 914 (C.A. 9); *Levey v. Helvering*, 68 F. 2d 401 (C.A. D.C.); *Brayton v. Welch*, 39 F. Supp. 537 (D. Mass.); cf. *Capitol Coal Corp. v. Commissioner*, 250 F. 2d 361 (C.A. 2).

In the face of that seeming unanimity, it may be wondered how so many payments by corporations to officers or their widows have in fact been held to be gifts. The answer is that the cases holding corporate payments to be gifts simply do not mention the question of corporate authority. There is not a single case, to our knowledge, that expressly takes issue with the statement in *Noel v. Parrott* and the twenty-odd cases following it that corporate officers and directors *cannot* make gifts of corporate assets to benefit the officers and employees and must be presumed not to have committed a breach of trust by doing so.¹³ The principle, in short, is one which has never been challenged, which seems to be conclusive when invoked, which is unanswerable in its force, but which is simply

¹³The only case we have found holding a corporate payment to be a gift that seems even to acknowledge that there might be such an issue is the *per curiam* opinion in *United States v. Bankston*, 254 F. 2d 641, 642 (C.A. 6), in which appears this single sentence touching on the problem: "It has been held that a corporation may make a gift. *Bogardus v. Commissioner*, 302 U.S. 34; *Richards v. Commissioner*, 111 F. 2d 376 (C.A. 5)." In *Bogardus*, as we shall show (*infra*, pp. 68-77), the Court treated the payment as having been made by the stockholders in their individual capacity, not by the corporation (the implication being that the payments were dividends to the stockholders of which they then made gifts to the ultimate recipients). In any event, *Bogardus* contains no mention of the corporate authority question. In *Richards*, the court simply held, without explanation, that the rental value of a home owned and maintained by a corporation and occupied by its sole stockholders, husband and wife, was a "gift" to them. The only mention of the corporate authority issue is to be found in Judge Sibley's dissent, which noted that, while family transfers might be presumed to be gifts, "A corporation has no . . . relatives" (111 F. 2d at 377).

ignored when another result is sought to be justified. All that is required, we believe, to resolve the seemingly insoluble gift-income problem, at least in the area of its major importance (payments by corporations and similar entities to officers and employees and their families), is to give to that fully-established and unchallenged, but frequently overlooked, principle its full scope: Except where the taxpayer affirmatively undertakes to show the contrary, the presumption is that the payment was *not* a misuse of corporate assets, that it was made to further the business interests of the corporation and not to satisfy the personal feelings or desires of the directors or officers who approved the payment, and hence is not a gift.

To round out the analysis, one other point should be made. Some of the cases cited above assumed that the incapacity of the corporation to make such a gift was a problem only of a lack of authority in the officers or directors which would have been overcome if the payment had been authorized or ratified by the stockholders, and at least one case in which there had been stockholder approval expressly distinguished *Noel v. Parrott* on that ground.¹⁴ As *Rogers v. Hill* makes clear, however, the problem goes deeper than that, and it is equally true that a majority of the stockholders cannot properly authorize a use of corporate assets for other than business reasons. If

¹⁴ *Blair v. Rosseter*, 33 F. 2d 286 (C.A. 9); see also *Cunningham v. Commissioner*, 67 F. 2d 205 (C.A. 3), in which the court relied upon the action of the directors in seeking stockholder approval of a payment as affirmative "evidence" that it was a gift.

the payment were approved by the stockholders unanimously, however, it would ordinarily be a matter of no concern to the state law—unless of course creditors were prejudiced—for what reason the payment was made, and in such a case the presumption that the payment was made for business reasons, because otherwise it would be a breach of trust, might not be available.¹⁵ If, however, the payment was not made for a business reason but solely for reasons personal to the stockholders, at their instance and with their approval, the corporation would be acting, not for itself, but simply as an agent for the stockholders, distributing to the object of their bounty moneys that would otherwise be available to the stockholders as dividends. However such a transaction might be treated for state purposes, for federal tax purposes it would seem clearly to be a constructive dividend

¹⁵ In *Blair v. Rosseter*, *supra*, note 14, the resolution making a \$50,000 "gift" to the president of the Sperry Flour Co. "in appreciation of" his able services was said to have been "unanimously" voted at the annual stockholders' meeting. That probably meant, however, only that all those represented at the meeting approved the resolution, and if in fact there was no business justification for the payment (though there clearly was) the stockholders present (or those voting general proxies) were guilty of a gross breach of duty to those absent. And even if all the stockholders were in fact present, so that there was no breach of trust element, ought it not nevertheless be presumed in the absence of special circumstances (see note 17, *infra*) that, when acting as a unit to approve or ratify corporate action, the stockholders act in the interests of the corporation (*i.e.*, for business reasons) and not as individuals serving their personal interests, particularly since they are not likely to be moved by the same "personal" desires unless it is a family corporation.

to the stockholders and a gift by them to the recipient,¹⁶ the corporation having been instructed, in effect, simply to pay the dividends to the stockholders' nominee. Cf. *Bogardus v. Commissioner*, 302 U.S. 34, discussed *infra*, pp. 68-77. Thus for a recipient to undertake to show that a stockholder-approved payment was made to him not for business reasons but for the personal reasons of the stockholders, so that the payment is a nontaxable gift to him, he would have to show, in effect, that the payment was a dividend taxable to his benefactors.¹⁷

3. We noted at the outset of this discussion that the statements in the cases that a corporation cannot make a gift, although accurate enough as a general principle and unquestionably true in the context in which they were made (payments to officers or employees), required some qualification. The obvious exception, of course, is that of charitable corporations making distributions to the objects of the founder's or contributors' charity (not, however, to their own employees), but there are also exceptions even in the case of business corporations.

The question turns on what capacities are attributed to a business corporation. Under the traditional view of a corporation as serving solely its stockholders' economic interests, the officers—while having

¹⁶ See cases cited in note 8, *supra*.

¹⁷ Such a contention is more likely to come, if at all, from the Commissioner, and where the payment is made by a family corporation to a natural object of the family's bounty—which is typical of the widow-bonus cases (see pp. 103-107, *infra*)—it seems not an unreasonable claim.

some freedom, in conformity with enlightened business practices, to go beyond the law of contracts to deal fairly and equitably with those who contributed to the business—ultimately were required to justify every expenditure by its direct relationship to the profit-making function of the corporation. Today, however, it is becoming increasingly recognized that a corporation has responsibilities to society as well as, and independent of, its responsibilities to its stockholders. See, *e.g.*, *A. P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A. 2d 581. In effect, the corporation has to that extent been personified and made, as it were, a “citizen” of society expected, in return for the benefits conferred upon it by society, to share the burdens of society. Since that is a responsibility that devolves upon a corporation simply as a member of society, rather than arising out of its profit-making activities as such, it is no less a “personal” responsibility, as we have defined the term, than that assumed by an individual. And, in turn, just as a payment made by an individual in recognition of that responsibility is a gift, so ought one made by a corporation be treated as a gift.

The most common manifestation of the felt social or community responsibility of a corporation is, of course, the charitable contribution to a tax-exempt organization, but other “public-responsibility” payments could equally be made to non-tax-exempt recipients and there the excludibility of the payment under § 22(b)(3) would become significant. The only limitation upon the treatment of such payments as

gifts for tax purposes is that imposed by the exclusion from the gift definition of payments made for "business" reasons, which we have defined as the same relationship to the business that is necessary to justify a business expense deduction. In short, to the extent that it is recognized for tax purposes that a corporation has independent social obligations "personal" to it for gift exclusion purposes, its expenditures for those purposes must be treated in the same degree as nondeductible "personal" expenses. The one thing that is plain from the statute, we believe, is that there can be no such thing as a business-expense deductible "gift."

However, recognition that a corporation may make "gifts" in exercise of its public responsibility in no way impairs the premises of the conclusion that a corporation cannot make gifts to its officers, employees, business associates, or their families—namely, that it lacks the capacity for the only motivations out of which gifts to such persons could be made (affection, pity, compassion, admiration, etc.) and such payments can be justified, if at all, only as a recognition of a responsibility arising out of their (or their deceased husbands') performance of services. One can, by a play of words, say that a corporation has a "social responsibility" to provide for employees in their old age, or for their dependents, but it is patent, that that is a responsibility devolving upon it, not as a member of society at large, but only because of the performance of services for it. And that which is paid because of the performance of services is no

less compensation, nor more a gift, because the employer follows enlightened business practices not imposed upon it by the law of contracts. What is decisive is that the payment is made because of services—and that precludes the characterization of gift, whether the employer is an individual entrepreneur, partnership, corporation, or other entity.

4. A final note should be added to clarify the respective scope of federal and state law in dealing with payments by corporations. By and large, the general state law of corporate powers seems to conform with our definition of gifts, in the sense that, with the exception of the "social responsibility" kind of payments, state law does not authorize the use of corporate assets for any reason that would qualify as a "gift reason" within the tax definition. Thus it is generally true, subject to the one exception, that no payment properly made by a business corporation can be a gift. That, however, is due only to the coincidence of the federal and state definitions, and it is ultimately federal law that is controlling.

If the several steps of analysis are separated, it is clear that, in the end, state law is relevant only for the aid it gives in determining the facts. Because of the presumption of the regularity of corporate acts, we can answer the factual question "Why was the payment made?" by asking the legal question "On what basis could the use of corporate funds be justified?", and the answer to that question can be accepted as the reason for the payment in the absence of the rare claim that the payment was in fact made for an improper reason.

Once the reason for payment has been determined, however, the function of state law is at an end, and there remain not one but two federal questions. The first, of course, is whether the ascertained reason for the payment is a "gift reason" within the federal definition. If it were concluded that the payment was made for a business reason and is taxable to the recipient, that would ordinarily be the end of the matter. But if it were found that the payment was made for a "personal" reason and was a nontaxable gift to the recipient, there would also be a second federal question—namely, the application of the income-attribution rules. Suppose, for example, it were found that the president of a corporation had directed a payment to be made to his son, not because of any services performed by the son, but only because of his familial affection for the son. While that would establish that the son received the payment as a gift, under the income-attribution rules it would be treated as a taxable distribution to the father of which he had made a gift to the son—i.e., the transaction would be essentially an assignment of income by the father.¹⁸ That result is easy, of course, if under state law the payment amounted to a misappropriation of corporate funds by the father (or could be justified only by treating it as compensation or a dividend to the father), but it would equally follow, we submit, even if a charter provision valid under state law had purported to authorize the "corporation" to make gifts to persons designated by the president. In short,

¹⁸ See note 8, *supra*.

the tax law is not bound to give to a corporation as a separate tax entity all the capacities ascribed to it by state law, and a payment treated by state law as having been made by a corporation in its own behalf can be treated for federal tax purposes as having been made by it in behalf of another to whom should be attributed a constructive receipt of the payment.

Ultimately, therefore, the capacities to be attributed to a corporation for tax purposes is a question of federal law. That is true even in the case of gifts made by a corporation in recognition of its social responsibilities. The tax question is not answered solely by the fact that state law permits the corporation so to use its assets; the federal rule *could* be that a corporation is recognized for tax purposes only in its business capacity and *any* gift made by it is to be treated as being made on behalf of the individual stockholders who ultimately control the corporation.¹⁸ Thus to treat a socially-motivated payment by a corporation as a gift by the corporation in its separate capacity, and not on account of the stockholders, requires a rule of federal law recognizing that a corporation has social responsibilities "personal" to itself. Thus, if a state should undertake to endow a corporation not only with a social responsibility but with the capacities of affection, pity, admiration, and the

¹⁸ When the gift tax was adopted, the reason given for applying it only to gifts by individuals, as we have noted earlier, was that a gift "by a corporation . . . would constitute a gift from the stockholders of the corporation." H. Rep. 708, 72d Cong., 1st Sess., pp. 27-28; S. Rep. 665, 72d Cong., 1st Sess., p. 39.

like, attributing to the corporation itself the "feelings" of the persons who control it, the tax law need not indulge in the same fiction and could—and, we submit, clearly should—treat a corporate payment so motivated as being made on behalf of the persons directing the payment and thus a constructive distribution to them of which they made gifts. In short, the only effect of such a state rule would be to preclude the inference from the presumption of the regularity of corporate acts that the payment was in fact made for business reasons. The reason for the payment would have to be established independently, but once established federal law, and only federal law, would govern the tax consequences.²⁰

E. PAYMENTS BY INDIVIDUALS PRESENT A MORE DIFFICULT ISSUE OF FACT BUT ARE OF RELATIVELY MINOR IMPORTANCE

Because the motivations of individuals, unlike corporations, are not confined to rigid channels, it is evident that the characterization of payments by individuals will pose more difficult factual issues. If the litigated cases be a guide, however, purported

²⁰ There is perhaps one way in which the state law might control the tax consequences of its own force. If a charitable contribution made by a corporation were *ultra vires* under state law, it is perhaps arguable that the very fact that the payment was a misappropriation of corporate assets by the directors as a matter of state law would require that it be treated as a receipt by them of which they made a gift, notwithstanding that, if state law had authorized the payment, it would have been treated for tax purposes as a payment made by the corporation in its separate capacity and not on behalf of the directors or stockholders. We intimate no view on that question and since the directors would usually be entitled to an offsetting charitable deduction in any event, it is unlikely to arise.

"gifts" by individuals to employees have not been a major problem. The explanation may be that until recently (notably in the widow-bonus cases) it seems generally to have been assumed that a "gift" could not be deducted by the payor, and, since an individual making a voluntary payment to another is likely to be in a higher bracket than his donee, it is usually more advantageous (to the extent the "intent" rationale permits the payor the choice) to have the payment be deductible by the payor and taxable to the payee. Corporate officers or executives, on the other hand, are often in a higher bracket than the corporation, and there the advantage lies in obtaining gift treatment for the payee even if it is necessary to forego the deduction—at a smaller net cost to the corporation, a greater net benefit can be conferred on the "donee" executive.

The suggestion that the prospects of favorable tax treatment may have something to do with the incidence of these transactions—as witness the large number of widow bonuses after lower court rulings that they were both deductible and nontaxable—does not at all imply that taxpayers act improperly in having tax consequences in mind. They have every right to do so, and if the law permits them to determine the character of a transaction by "intending" it as one thing or another, they can properly take advantage of it and "intend" that which produces the least net tax. Our point is rather that the tax consequences ought not to turn on such an "intent" and that in part at least the problems arise only because

it does. The definition of gifts we propose—since it makes clear that a payment cannot be both a gift and deductible and, further, that a gift of corporate funds to officers, employees or their families would necessarily be a taxable distribution to the directors or stockholders—would thus accomplish a great deal even if it did not contribute to the solution of the factual questions when they arise.

In fact, however, we think the definition also contributes substantially to the resolution of the factual question even in cases of payments by individuals. The primary difficulty now encountered is that the question of "fact" is put without its ever being defined—the trier is asked to find an "intent to make a gift" without being told what the ingredients or test of such an intent is. By explicitly stating what the controlling facts are, the suggested definition at least puts the factual inquiry on a meaningful basis and tells the trier what it is he is to look for.

While the question is not directly involved in this case, completeness of analysis requires that we briefly indicate the nature of the factual issues that would be encountered in characterizing individual payments. They seem to be basically of two separate kinds: (1) where there may be two independent motives, one of which is a gift motive and the other is not, and the question is which is "dominant"; and (2) where the question is whether the causal relationship between, say, the performance of services and the payment is "proximate."

1. In any employment relationship between individuals there are likely to be developed personal bonds

from the close association, and there is thus likely to be a basis for a factual dispute whether a voluntary payment was prompted by the employer's receipt of the services or by his personal affection or like feeling for the employee. It perhaps ought to be recognized that in such situations the motives are inextricably mixed—the employer would not have made the payment but for the services, but he equally would not have done so had he not "liked" the employee—and that looking for the "dominant" one may be a fruitless search. What is required is an objective rule to govern such cases—e.g., by treating the payment as compensation to the extent that it bears a reasonable relationship to the value of the services; as a gift, to the extent of the excess. In effect, that amounts simply to the accepted presumption that payments in an employment relationship are compensation, and places the burden on the employee to prove that the employment relationship was essentially a fortuitous circumstance providing only the occasion for the development of the personal relationship which prompted the payor to make a gift.

2. The more difficult problem conceptually—though not likely often to be of practical importance—is to define the kind of motivational response to the receipt of services that provides a proximate causal relationship between the services and the payment. As pointed out by a somewhat extreme example in our *Dubenstein* brief (a lavish reward by a parent to the rescuer of his child, p. 17, n. 10), it is not enough to make the payment compensation that the services were a *sine qua non* of the payment or that the mo-

tive, broadly speaking, was "gratitude for services." Some further refinement of "gratitude for service" is required.

A borderline case will better illustrate the nature of the problem. Suppose that a sole proprietor of a business, having made his fortune, sells the business and retires, and is thereafter moved out of a sense of satisfaction and well-being because of his remarkable success to make a generous distribution of some of his gains to his former employees. The retiring employer may be moved less by any sense that fairness demands the payment than by his own sense of gratification with the bounties that have come to him and an out-going desire to share his good fortune with those who have had some part, though perhaps only fortuitously, in bringing it about. The causal relationship between the services and the payment is obviously much more remote than in the ordinary "bonus" case, and at some point a line must be drawn. We suggested in *Duberstein* that the distinction hinges on whether the payor feels a sense of "obligation" to make the payment, a sense that it is "right" or "fair" that something more be paid. The distinction has been better put, however, by Judge Learned Hand in *Bogardus v. Helvering*, 88 F. 2d 646, 648 (C.A. 2), reversed, 302 U.S. 34, which, as we shall later show (pp. 68-77), involved an essentially identical question.

Because Judge Hand's opinion so aptly states the views we have tried to express, we shall allow it to do service also as our summing up. No less in its per-

ception of the necessity of stating a question of fact before answering it than in its recognition that the question is one of motive rather than intent, it is an opinion that stands alone among the decisions of the lower courts, and the light it sheds is no less illuminating because it was so soon to be dimmed (see *infra*, pp. 68-77). Noting that "legal gifts" were not necessarily gifts for tax purposes, Judge Hand proceeded (pp. 648-649):

* * * When the donor is not an obligor, that is, when he is under no legal sanction to make the payment, the decision must therefore depend upon his intent—perhaps more properly upon his motive—and so the courts have very generally put it. [Citations.]

We have, however, not found much help in learning what that intent or motive must be, and, while the issue remains unsettled, it seems scarcely profitable to catalogue the evidence; we rather need a test by which to determine what evidence is relevant. We agree that a man may make a gift to an old employee without meaning it as "compensation"; though probably such cases will be uncommon, especially if he declares that the payment is "in recognition of" past services. We will assume that the gift would be nothing more, if for instance the donor believed that what he had paid in the past was the full measure of anything that the employee was then "entitled to"; that in fairness he did not "owe" a cent; and that anything he might give was not only beyond what the law would exact, but what the employee could in justice

demand. Even so the past services would be the cause of the gift in the sense that except for them the donor would never have been moved to spontaneous generosity, but the gift would not pay for the services. On the other hand, employers sometimes feel that their employees have never been paid in full; that their services deserved more than they have received; that the account between them is not quite in equitable balance. Such gifts are "compensation"; they are not only the result of the past relation, but they are a return specifically allocated to the donee's services. For example, a patient may increase his surgeon's bill; it would be "compensation," though a gift; yet, if he made him a present only because his skill, solicitude and kindness had bound them in a warm friendship, it would not be. A donor must not be moved to satisfy some uneasiness, some scruple, some sense that there is an outstanding claim which those would recognize to whose opinion he is sensitive: something which makes the payment more than an unconstrained act of affection or regard. * * *

* * * [After reviewing the evidence:] Left to ourselves we should therefore have been disposed to say that these gifts were actuated by a sense that in fairness the donees deserved something more than they had got in the past, now that the ship had come in. But the decision is not primarily for us at all [but for the Board, whose decision that they were so actuated and hence constituted compensation was a reasonable inference from the evidence and must therefore be affirmed] * * *.

THE PROPOSED DEFINITION OF GIFTS IS SUPPORTED BY THE LATER DECISIONS OF THIS COURT AND CAN BE RECONCILED WITH THE EARLIER DECISIONS TO THE EXTENT THAT THEY HAVE NOT ALREADY BEEN MODIFIED

The definition of gifts we propose is, we believe, fully supported by the more recent decisions of this Court and differs from them, if at all, only in its degree of explicitness. To the extent that the language of the earlier cases is inconsistent, we believe they have already been modified by the later cases. We will begin with the later, and we think controlling, cases, and then examine the extent to which the earlier cases are inconsistent.

A. ROBERTSON AND LOBUE SUPPORT BOTH THE CONTROLLING SIGNIFICANCE OF MOTIVE AND THE DEFINITION OF GIFT MOTIVES

The two most recent "gift" decisions of this Court, *Robertson v. United States*, 343 U.S. 711, and *Commissioner v. LoBue*, 351 U.S. 243, are, we submit, virtually conclusive authority for the two propositions that gifts turn on motive and that only essentially "personal" motives are gift motives.

1. As shown in detail in our brief in *Duberstein* (pp. 13-15), *LoBue* expressly rejected the lower courts' view that whether stock options given employees were gifts or compensation depended on whether the employer "intended" them "as compensation." There the Tax Court found, and the Court of Appeals affirmed the finding, that the employer did *not* intend the options as compensation. To this Court, however, "intent" in that sense was meaning-

less, and the only important question was *why* the options had been given—*i.e.*, whether they were motivated by “disinterested generosity” or by business reasons. *Robertson*, though in perhaps what is no more than a dictum, confirms that view in its allusion to gifts as payments made “out of” (*i.e.*, motivated by) certain kinds of “impulses.” 343 U.S. at 713-714.

2. On the separate question of the kinds of motives that should be treated as gift motives, both those decisions also fully support our view that a gift can proceed only from personal, non-business motivations—*LoBue*, by summarily rejecting the notion that a payment “made by a company engaged in operating a business for a profit” (p. 246) and motivated by a business reason (“prompted by the employer’s desire to get better work from him”, p. 247) could be a gift; and *Robertson*, by enumerating the kinds of personal reasons out of which gifts could be made, namely, “affection, respect, admiration, charity or like impulses.” 343 U.S. at 713-714.

In short, *LoBue*, supported by at least a dictum in *Robertson*, establishes the two essential ingredients of the definition urged here: that an “intent” to make a gift is not controlling; that motive, *i.e.*, the reasons why the payment was made, is controlling; and that “business” reasons are not gift motives. That is our entire position, in a nutshell; and the elaboration in Point II, *supra*, is no more than an attempt to make explicit the premises and implications of accepting those basic concepts.

B. AMERICAN DENTAL, TO THE EXTENT INCONSISTENT, HAS BEEN OVERRULED BY JACOBSON, GLENSHAW GLASS, AND LOBUE

The decision of the Court that seems most inconsistent with the approach later adopted by the Court in both the "gift" and the "income" field is *Helvering v. American Dental Co.*, 318 U.S. 322. While that case was discussed in our *Kaiser* brief (No. 55, this Term, pp. 28-29), we will restate it here in order to consolidate the discussion of the relevant decisions of this Court.

In *American Dental*, the creditors of a corporation accepted partial payment and cancelled the balance of the indebtedness, doing so, as the Board of Tax Appeals found, "for purely business reasons" and not for "altruistic reasons or out of pure generosity" (p. 330). This Court held that the cancellations were nevertheless gifts, defining a gift simply as "the receipt of financial advantages gratuitously" (p. 330). The Court apparently meant that any benefit received without obligation or consideration, regardless of the payor's motives, was a gift, for it added (p. 331):

* * * The fact that the motives leading to the cancellations were those of business or even selfish, if it be true, is not significant. The forgiveness was gratuitous, a release of something to the debtor for nothing, and sufficient to make the cancellation here gifts within the statute.

The broad view thus expressed, we respectfully submit, cannot survive the later decisions of this Court and is, indeed, inconsistent in concept even with the

earlier decisions. To the extent that it holds that the motives for a transfer are irrelevant to the gift question, as it literally does, we have already shown that it is inconsistent with the later decision in *LoBue*. But the inconsistency is deeper than that, for the opinion equally abandons the "intent" language of the earlier decision in *Bogardus v. Commissioner*, 302 U.S. 34 (discussed *infra*, pp. 68-77), and makes the gift question turn, not at all upon what the transferor did, but solely on what the transferee got. The opinion defines a gift as the "receipt of financial advantages gratuitously," and not even the qualification "gratuitously" implies a reference to the transferor's state of mind, for the opinion made it clear that all it meant by that was that there was no legal obligation or bargained-for exchange. The opinion thus seemed to adopt a purely objective definition of gifts as anything received for which the recipient gave no consideration in the contract-law sense—in effect, any transfer that is a gift in the property law sense is a gift for tax purposes. In that respect, the opinion was, we submit, inconsistent with the principle otherwise universally accepted both by this Court (*Old Colony Trust Co. v. Commissioner*, 279 U.S. 716, 730; *Bogardus v. Commissioner*, *supra*) and the lower courts (see note 3, *supra*) that a payment made without obligation and not for a bargained-for exchange is not necessarily a gift and whether it is or not depends on some aspect of the payor's action (intent or motive).

American Dental can be explained, we think, only as involving a confusion of the concepts relevant to the "gift" question and those relevant to the "income" question. That one *receives* a benefit "for nothing", as we have previously noted, proves only that it is a windfall to him and presents the question whether a windfall is within the scope of the comprehensive definition of income in § 22(a). It does not, by itself, present the "gift" question, which turns instead upon some aspect of the payor's action. Thus, at least in terms of the considerations the Court deemed relevant, if not in its phrasing of the question, *American Dental*, to the extent that it can be rationalized with other cases, must be taken as a holding that windfalls are not income. That, however, while more satisfactorily explaining *American Dental* in its context, gives it no greater vitality today, for, as we show in *Kaiser* (pp. 39-40), the later decision in *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, clearly establishes (despite contrary inferences previously drawn from the broad language of *Eisner v. Macomber*) that windfalls *are* income.

In terms of its precise holding—that gain from a cancellation of indebtedness is not taxable—*American Dental* has fared no better, for it was severely limited, if not substantially overruled, by *Commissioner v. Jacobson*, 336 U.S. 28. Although the Court in *Jacobson* refrained from expressly overruling *American Dental*, both a concurring opinion and a dissent written by the author of *American Dental* found no sub-

stantial difference in the cases and thought the results in conflict (p. 52).²¹

In short, we submit that whatever doctrinal significance *American Dental* may have had has been destroyed either by *LoBue* or *Glenshaw Glass* and that it is at least questionable whether even its precise holding retains any substantial vitality after *Jacobson*.

C. THE HOLDING IN *BOGARDUS* IS RECONCILABLE WITH THE SUGGESTED DEFINITION OF GIFTS AND THE OPINION LENDS AFFIRMATIVE SUPPORT TO THAT DEFINITION

It is language in this Court's opinion in *Bogardus v. Commissioner*, 302 U.S. 34, on which the petitioner in this case almost exclusively relies, that seems to have caused the greatest difficulty in this area and which, we believe, requires clarification. As we shall show, but for its use of the language of intent (when the Court itself seems to have meant motive), *Bogardus* can be fully reconciled with the later cases on which we rely. To show that, we will first state the facts of the transaction out of which the case arose; show how the question would be resolved under the

²¹ The lower courts have similarly been unable to find a meaningful distinction and, since *Jacobson*, *American Dental* has been treated virtually a dead letter; the courts almost invariably finding that a cancellation of indebtedness is taxable and not a gift. E.g., *Spear Box Co. v. Commissioner*, 182 F. 2d 844 (C.A. 2); *Capitol Coal Corp. v. Commissioner*, 250 F. 2d 361 (C.A. 2); *Bradford v. Commissioner*, 233 F. 2d 935 (C.A. 6); *Denman Tire & Rubber Co. v. Commissioner*, 192 F. 2d 261 (C.A. 6); *Pacific Magnesium Co. v. Westover*, 183 F. 2d 584 (C.A. 9); *Rory Custom Clothes Corp. v. United States*, 171 F. Supp. 851 (Ct. Cls.). But see *Reynolds v. Boos*, 188 F. 2d 322 (C.A. 8), holding a debt cancellation to be a gift on the authority of *American Dental* without citing *Jacobson*.

formulation we suggest; and then consider the implications of the way in which the Court decided it.

1. The Universal Oil Products Company (Universal) was organized in 1914 having as its sole asset a patent application for a gasoline cracking process. It continued development work on the process, without significant income, until the process was perfected in 1922. The process was then universally accepted in the oil industry and Universal's royalty income grew phenomenally, from a few thousand dollars in 1922 to over \$9 million in 1930. In January 1931, the stockholders sold all their stock in Universal to an oil company for \$25 million, with some \$4 million of the liquid assets of Universal first being transferred to a new corporation (Unopco), the stock of which was distributed pro rata to the old stockholders of Universal.

A few days after the sale was consummated, the stockholders of Unopco met informally to discuss the investment policies to be followed by their new investment company. During the meeting, the president commented on their "great good fortune," noted that they had had the "loyal support of a number of employees particularly" during the period they were "struggling and moving forward," and suggested that "it would be a nice and generous thing for us to show our appreciation and to remember them in the form of a gift or honorarium." All the shareholders "acquiesced" and were glad to do it." Thereafter, the board of directors of Unopco adopted a resolution, unanimously affirmed by the stockholders, authorizing payment out of the surplus of Unopco of

a total of \$607,500 to 64 former and present employees, attorneys, and expert consultants of Universal. 88 F. 2d at p. 647. The question was whether those payments were gifts or compensation to the recipients.

2. On those facts, it is clear that the question cannot be resolved by the presumption of regularity of corporate payments. There was no possible business reason or justification for the payments to be made by Unopco in its own behalf, for Unopco, as a separate corporate entity, had never had anything to do with the recipients and the payment was totally unrelated to its investment business. Rather Unopco made the payment simply as a conduit for its stockholders to recipients designated by them; constructively, the payment was a distribution by Unopco to its stockholders (taxable to them as a dividend if the other requirements were met) and a payment *by them* in their personal capacity to the ultimate recipients.

Once the problem is viewed, as the Court viewed it, as a payment by the stockholders themselves to the employees of the corporation they had sold, it becomes essentially identical to the problem discussed above (pp. 60-62) of characterizing a payment by an individual proprietor who, after selling the business, makes a payment to his former employees. The question turns on how close the causal relationship was between the performance of the services and the receipt of the payment: whether, as Judge Hand expressed it in his *Bogardus* opinion, the payor was "moved to satisfy some uneasiness, some scruple, some sense that there is an outstanding claim which those

would recognize to whose opinion he is sensitive," or by "a sense that in fairness the donees deserved something more than they had got in the past," (compensation), or whether, on the other hand, there was no such sense of obligation but only an "unconstrained act of affection or regard" or of "spontaneous generosity" (gift).

That question of motivation is necessarily one of fact to be left in the first instance to the trier of fact, whose finding must control if supported by evidence. And on the facts in *Bogardus*, a finding that the payment was prompted by an unconstrained sense of generosity, with no sense that any amount was "due" in fairness or "ought" to be paid, would readily have been supportable. Of particular significance is the fact that no thought was given to the making of the distribution until after the sale had been finally consummated. Had there been a feeling that in equity something more was due the employees for their loyal service to Universal, it could be expected to have manifested itself while the stockholders were winding up their affairs in Universal and settling their accounts, particularly since any "obligation" toward the employees would be primarily an "obligation" of Universal's, properly chargeable to its books and, indeed, deductible by it. It is possible, of course, that the stockholders simply overlooked the matter until after the sale was consummated and then recognized their unsatisfied "obligation" and undertook to satisfy it out of their own pockets. It seems more consistent, however, to say that the accounts between the employees and their immediate employer, Universal, were

thought to be in full "equitable balance", in Judge Hand's phrase, and no more could properly be charged the corporation. From that it would follow that the stockholders had no sense that more was due and thus that their action was entirely spontaneous and unconstrained, moved simply by a feeling of benevolent generosity and good will.

The Board of Tax Appeals, however, had held the payments compensation, and assuming, as Judge Hand did in affirming its decision, that the Board had applied the standard which he so carefully defined and decided the question which he so carefully asked,²² there was perhaps also enough evidence to support its decision, particularly with the presumptive correctness of the Commissioner's determination.

In short, under our view, the question of motivation framed by Judge Hand was one for the trier of fact and, although the evidence that the payment was entirely unconstrained and spontaneous was strong, there was probably sufficient evidence to support either result reached by it.

3. This Court, with four Justices dissenting, set aside the Board's findings and held the payments to be gifts. Both the majority and the dissenting opinions are significant, and both will be discussed, though starting with the dissent.

a. The brief dissenting opinion written by Mr. Justice Brandeis, although reflecting an interchangeable use of "intention" and "motive," was, we be-

²² In fact, however, that seems not to have been the case. (See *Morrell v. Commissioner*, B.T.A. Mem. Dec., 36,147, Apr. 30, 1936).

lieve, essentially an endorsement of Judge Hand's more detailed analysis of the problem and of the controlling issues of fact. It said simply that, in distinguishing gifts from compensation (302 U.S. at p. 45):

* * * What controls is the intention with which payment, however voluntary, has been made. Has it been made with the intention that services rendered in the past shall be requited more completely, though full acquittance has been given? If so, it bears a tax. Has it been made to show good will, esteem, or kindness toward persons who happen to have served, but who are paid without thought to make requital for the service? If so, it is exempt.

We think there was a question of fact whether payment to this petitioner was made with one intention or the other. * * * It was for the triers of the facts to seek among competing aims or motives the ones that dominated conduct. * * *

From the later shift to the phrase "competing aims or motives" it seems evident that the opinion did not draw a distinction between the words "intention" and "motive," and we submit that the opinion cannot be read to mean "intention" in its technical sense. Surely it is not significant that a payment is made "to show" good will, esteem, or kindness in a literal sense—*i.e.*, to cause others to believe that the payor feels those impulses. It is significant only that the payment was prompted by those impulses, not that the payor wanted "to show" them. The opinion

seems to have used that formulation only in the sense that a payment is in fact a manifestation of the inducing motives. So also, the reference to an "intention" that services "shall be requited more completely, though full acquittance has been given," seems to be only a short-hand statement of Judge Hand's description of a payment prompted by a sense that, although "adequate" payment has been made, still in fairness something more is due. So construed, the dissenting opinion—though its failure to distinguish motive and intention has not contributed to clarity—is entirely consistent with our position.

b. The majority opinion, written by Mr. Justice Sutherland, can likewise be read as ultimately applying no different test from that articulated by Judge Hand, simply reaching a contrary conclusion on the facts that the payment was not induced by any sense that something more was owing the employees but was instead a free-flowing act of generosity. The considerations that seemed to control decision were that there was "entirely lacking the constraining force of any moral or legal duty as well as the incentive of anticipated benefit of any kind beyond the satisfaction which flows from the performance of a generous act" (p. 41); that "rejoicing in the fact of their own great good fortune, and mindful of the former loyal support" of the employees, the stockholders "were moved * * * to an act of 'spontaneous generosity'" (p. 42); that full compensation had been given and, as stipulated, "no one was under any obligation, legal or otherwise (and this would include a moral obligation, however slight)" to pay more (p. 42); and

that there was absent any "moral or other obligation" (p. 43). Those elements are clearly elements of motivation, not of "intent", and are directly responsive to Judge Hand's formulation of the issue as being whether there was some sense of obligation to make the payment or whether it was an "unconstrained" act of "spontaneous generosity." If then, as we think they were, those elements were the essential basis for the decision, it follows that *Bogardus* itself actually applied a motivation, rather than an intention, test—and, indeed, apart from the standard of review issue, did so correctly to reach a sound result.

It is true of course that the opinion also repeatedly refers to "intention," but, just as in the dissenting opinion, that shows no more than a common confusion of terms. The controlling inquiry is upon what considerations decision was made to turn and, whatever language the Court may have loosely used, we submit that *Bogardus* was decided on the basis of inquiry into the reasons for the payment, not the intent of the payor to make a gift *vel non*.

4. Apart from its loose use of "intert," there are two other aspects of *Bogardus* that have led to confusion and require clarification.

The first was the failure of the opinion to articulate precisely, as Judge Hand had done, the broad scope of the sense of "obligation" that would provide a sufficient causal relationship to make the payment compensation "for" the services. Judge Hand, to avoid the restrictive implications of "obligation," had carefully avoided that term altogether, speaking instead

of the sense that "in fairness" something more is due, or some "uneasiness" or "scruple" that is satisfied by the payment. The Court, in referring to the absence of an obligation "however slight" or of a "moral or other obligation," seems to have meant the same thing, but its use of the term "obligation" has led other courts to identify the test with the technical concepts of "legal" and "moral" obligations.

The second was the failure to emphasize that the question was peculiar to payments by individuals out of their personal funds. Although the opinion makes clear that the Court in fact viewed the transaction as essentially a payment by the stockholders themselves and not a payment by Unopco (other than as an agent for the stockholders), it did not acknowledge the necessary implication that there was a taxable distribution from Unopco to its stockholders of which they then made gifts. Because of that lack of emphasis, *Bogardus* continues to be relied upon in cases involving payments by corporations in their own behalf, which, as we have seen (pp. 40-56, *supra*), involve a very different problem and to which *Bogardus* actually has no relevance. The difference is simply that corporate funds could not properly be paid to an employee unless there *were* some such sense that in fairness something more was due, and that sense, if we properly interpret *Bogardus* in the light of Judge Hand's opinion, would without more make the payment compensation.

With those clarifications of the opinion being made explicit, there is nothing in *Bogardus* that is inconsistent with the definition of gifts urged here, and in

fact it supports the view that the controlling inquiry is into the reasons for the payment, not whether the payor "intended" to make a gift.

IV

THE PAYMENT TO PETITIONER WAS NOT A GIFT

1. Petitioner contends that the district court made a finding of fact that the payment here was a gift, that that finding was supported by evidence, and thus the district court must be sustained. Since neither the district court nor the petitioner has yet said what "fact" it was that was found, we must infer that the fact found was that the directors "intended to make a gift." We, however, not only do not challenge that finding but expressly concede that both the directors and the vestrymen sincerely "intended to make a gift" in the only sense in which that "intent", when divorced from motive, has any meaning—namely, it was their sincere desire that the payment not be taxable. Our position is rather simply that "intent" in that sense has no relevance to any meaningful definition of gifts for tax purposes.

*2. If the definition of gifts we have suggested be accepted, its application to the facts of this case poses no problem. The only reason for which the directors and vestrymen could properly give to petitioner assets of the church (the assets of the operating company being ultimately assets of the church) was out of a recognition that something more was due him; on the occasion of his departure, for his long and valued services for the church—in short, as reasonable compensation for his services. That is no

o. doubt true as a matter of state law, for the assets are dedicated to religious purposes and could be paid to petitioner only to pay him for his labor in behalf of the church. It is true independently for federal tax purposes, since the church is exempt from federal income taxes only so long as it is "operated exclusively for religious * * * purposes" and no part of its "net earnings * * * inures to the benefit of any private * * * individual" (§ 101(6)). A payment to an officer or employee of anything more than reasonable compensation would deprive the church of its exemption. *E.g., Mabee Petroleum Corp. v. United States*, 203 F. 2d 872 (C.A. 5). And, finally, even if otherwise permissible, a use of church assets by the vestrymen to satisfy their personal desires—*e.g.*, to benefit a personal friend—would be a taxable distribution to them.

Unless the contention is that the several directors and vestrymen all committed a breach of trust by giving church assets to petitioner just because they liked him—and of course that is not the contention—what is the relevance of the testimony relied upon so heavily by petitioner that all the Vestry "liked" him "personally" and thought of him "in the highest regard" or that he had a "pleasing personality"? To paraphrase the Board of Tax Appeals in another case, "The payment in question was not made from [the vestrymen's] funds, but from the funds of [the church]. It is difficult to see what, if any, bearing individual friendships could have had upon the making of it. Surely it would not be contended that the [vestrymen] would give away [church] funds in token of [their] friendship for petitioner." *Van Sicklen v. Commis-*

sioner, 33 B.T.A. 544, 548." And, of course, none of the testimony here can be read as even implying that the payment was made simply out of personal affection. Rather both the witnesses relied upon took care to show that there was a proper "business" (church business, in this instance) reason for the payment, stating that petitioner "did a splendid piece of work" in a "difficult situation" (R. 27) and that he "had loyally and faithfully served Trinity" (R. 37). It is that and only that which justified the expenditure of \$20,000 of the assets dedicated to religious purposes, and it is only that which can be deemed the reason for the payment for purposes of the gift exclusion. And if that was the reason, the payment cannot be a gift. Not being a gift, it necessarily is, on the facts here, taxable as compensation.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

WAYNE G. BARNETT,
Assistant to the Solicitor General.

MARCH 1960.

²² The same analysis equally disposes of the minister retirement-pension cases (stated *infra*, pp. 102-103) on which petitioner relies (Br. 21). While it may be that the members of a congregation feel affection for their retiring minister, the pension is paid not by them but out of regular church funds dedicated to religious purposes, and the use of those funds can be justified only as giving a faithful servant his due.

APPENDIX A

INTERNAL REVENUE CODE OF 1939 (26 U.S.C., 1952 ed.)

§ 22. GROSS INCOME—(a) GENERAL DEFINITION.

“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(b) EXCLUSIONS FROM GROSS INCOME.

The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(1) Life insurance, etc.

Amounts received—

(A) under a life insurance contract, paid by reason of the death of the insured; or

(B) under a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee, paid by reason of the death of the employee;

(2) Annuities, etc.

(A) In general.

Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. * * *

(3) Gifts, bequests, devises, and inheritances.

The value of property acquired by gift, bequest, devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. For the purposes of this paragraph, if, under the terms of the gift, bequest, devise, or inheritance, payment, crediting, or distribution thereof is to be made at intervals, to the extent that it is paid or credited or to be distributed out of income from property, it shall be considered a gift, bequest, devise, or inheritance of income from property;

(5) Compensation for injuries or sickness.

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23 (x) in any prior taxable year, amounts received through accident or health insurance or under work-

men's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country;

(6) Ministers.

The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation;

§ 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In general.

All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

(q) Charitable and other contributions by corporations.

In the case of a corporation, contributions or gifts payment of which is made within the taxable year to or for the use of:

(1) The United States, any State, Territory, or any political subdivision thereof or the District of Columbia, or any possession of the United States, for exclusively public purposes; or

(2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United

States or in any possession thereof or under the law of the United States, or of any State or Territory, or of the District of Columbia, or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, veteran rehabilitation service, literary, or educational purposes or for the prevention of cruelty to children (but in the case of contributions or gifts to a trust, chest, fund, or foundation, payment of which is made within a taxable year beginning after December 31, 1948, only if such contributions or gifts are to be used within the United States or any of its possessions exclusively for such purposes), no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. * * *

INTERNAL REVENUE CODE OF 1954 (26 U.S.C., 1958
ed.)

§ 61. GROSS INCOME DEFINED.

(a) GENERAL DEFINITION.

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

- (1) Compensation for services, including fees, commissions, and similar items;
 - (2) Gross income derived from business;
 - (3) Gains derived from dealings in property;
 - (4) Interest;
 - (5) Rents;
 - (6) Royalties;
 - (7) Dividends;
 - (8) Alimony and separate maintenance payments;
 - (9) Annuities;
 - (10) Income from life insurance and endowment contracts;
 - (11) Pensions;
 - (12) Income from discharge of indebtedness;
 - (13) Distributive share of partnership gross income;
 - (14) Income in respect of a decedent; and
 - (15) Income from an interest in an estate or trust.
- * * * *

PART II.—ITEMS SPECIFICALLY INCLUDED IN GROSS INCOME

§ 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.

§ 72. ANNUITIES; CERTAIN PROCEEDS OF ENDOWMENT AND LIFE INSURANCE CONTRACTS.

(a) GENERAL RULE FOR ANNUITIES.

Except as otherwise provided in this chapter, gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment, or life insurance contract.

§ 74. PRIZES AND AWARDS.

(a) GENERAL RULE.—Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.

(b) EXCEPTION.—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if—

(1) the recipient was selected without any action on his part to enter the contest or proceeding; and

(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award.

PART III.—ITEMS SPECIFICALLY EXCLUDED FROM GROSS INCOME

§ 101. CERTAIN DEATH BENEFITS.

(a) PROCEEDS OF LIFE INSURANCE CONTRACTS PAYABLE BY REASON OF DEATH.—

(1) GENERAL RULE.—Except as otherwise provided in paragraph (2) and in subsection (d), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.

(b) EMPLOYEES' DEATH BENEFITS.—

(1) GENERAL RULE.—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee.

(2) SPECIAL RULES FOR PARAGRAPH (1).—

(A) \$5,000 limitation.

The aggregate amounts excludable under paragraph (1) with respect to the death of any employee shall not exceed \$5,000.

§ 102. GIFTS AND INHERITANCES.

(a) GENERAL RULE.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

(b) INCOME.—Subsection (a) shall not exclude from gross income—

(1) the income from any property referred to in subsection (a); or

(2) where the gift, bequest, devise, or inheritance is of income from property, the amount of such income.

* * * *

§ 104. COMPENSATION FOR INJURIES OR SICKNESS.

(a) IN GENERAL.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer); and

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service.

* * * *

§ 105. AMOUNTS RECEIVED UNDER ACCIDENT AND HEALTH PLANS.

(a) AMOUNTS ATTRIBUTABLE TO EMPLOYER CONTRIBUTIONS.—Except as otherwise provided in this section, amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.

§ 107. RENTAL VALUE OF PARSONAGES.

In the case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

§ 117. SCHOLARSHIPS AND FELLOWSHIP GRANTS.

(a) GENERAL RULE.—In the case of an individual, gross income does not include—

(1) any amount received—

(A) as a scholarship at an educational institution (as defined in section 151(e)(4)),

or

(B) as a fellowship grant, including the value of contributed services and accommodations; and

(2) any amount received to cover expenses for—

- (A) travel,
- (B) research,
- (C) clerical help, or
- (D) equipment,

which are incident to such a scholarship or to a fellowship grant, but only to the extent that the amount is so expended by the recipient.

* * * *

(B) EXTENT OF EXCLUSION.—The amount of the scholarship or fellowship grant excluded under subsection (a)(1) in any taxable year shall be limited to an amount equal to \$300 times the number of months for which the recipient received amounts under the scholarship or fellowship grant during such taxable year, except that no exclusion shall be allowed under subsection (a) after the recipient has been entitled to exclude under this section for a period of 36 months (whether or not consecutive) amounts received as a scholarship or fellowship grant while not a candidate for a degree at an educational institution (as defined in section 151(e)(4)).

* * * *


§ 119. MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER.

There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—

(1) in the case of meals, the meals are furnished on the business premises of the employer, or

(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

* * * * *



APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 13,900

UNITED STATES OF AMERICA, APPELLANT

v.

EMMA A. ALLINGER, INDIVIDUALLY, AND EMMA A.
ALLINGER, RUTH E. GIBSON AND G. LINCOLN GIB-
SON, JR., AS TRUSTEES UNDER THE WILL OF CHARLES
E. ALLINGER, DECEASED, APPELLEES

Decided March 3, 1960

*On Appeal from the Judgment of the United States
District Court for the Eastern District of Michigan*

Before CECIL and WEICK, Circuit Judges, and KENT,
District Judge

Per curiam: The sole question in this case is whether the sum of \$35,000 paid by The Chas. A. Strelinger Company to Emma A. Allinger, widow of Charles E. Allinger, is taxable income or exempt as gifts under Section 22(b)(3) of the Internal Revenue Code of 1939.

The facts are not really disputed and according to the "findings" of the Trial Judge are briefly as follows: The Strelinger Company is a corporation organized under the laws of Michigan and was sub-

stantially owned by the Charles T. Bush and Charles E. Allinger families. Bush and Allinger owned, respectively, approximately 30 and 37% of the stock. About five percent of the stock was owned outside of the two families. The two principal stockholders had been employed by the Company for more than fifty years at the time of the death of Allinger in 1951, and at that time and for several years prior thereto each had received an annual salary of \$35,000. The directors were Charles T. Bush, his son A. Stansell T. Bush, Charles E. Allinger and his son-in-law, G. Lincoln Gibson, Jr.

In 1947 the two principal stockholders, by reason of age and health, became concerned about what would happen to their wives in the event of their deaths. Thereupon, they made mutual promises that if either one predeceased his wife the Company would pay to the surviving spouse an amount equal to the salary of the deceased at the time of the death for a period not to exceed one year. These promises were discussed with the respective families.

About a month after the death of Allinger, the Board of Directors met and passed a resolution, as follows: "Resolved, that in confirmation of a voluntary agreement previously entered into as of October, 1948, the Chas. A. Strelinger Company, in consideration for past services, shall voluntarily, upon the death of Chas. T. Bush or Charles E. Allinger, pay to the widow of its president, Chas. T. Bush, or its secretary-treasurer, Charles E. Allinger, an amount equal to the salary of said Bush or Allinger at the time of such death for a period not to exceed one year from the date of such death, and be it"—

It was further resolved that if either wife should predecease her husband or die before the full amount

equal to a year's salary had been paid, the money was to be paid to the respective estates.

The wives were not required to perform any duties or make any contribution to the Company. The duties and responsibilities of Mr. Allinger were not intended to be increased and were not increased as a result of his understanding with Mr. Bush.

Mrs. Allinger received \$35,000, the full amount of a year's salary, during the years 1951 and 1952. She paid the tax and then brought this action to recover it back for the reason that it had been unlawfully collected. The Trial Judge found that the payments to Emma A. Allinger, by the Company, were "voluntary gratuities" and not subject to tax.

"The question presented is one of fact. Whether the payment was a gift or taxable income * * * depends upon the intention of the parties, particularly that of the donor. The intent of the donor is to be determined from a consideration of all the facts and circumstances surrounding the payment." *U.S. v. Bankston*, 254 F. 2d 541 (C.A. 6). Intention must govern. *Bogardus v. Com. of Internal Rev.*, 302 U.S. 34, 43.

There are many cases on the subject but the thread running through all of them is that each case must be judged upon its own merits. There is no exact standard of measurement. The court must consider the peculiar facts of each case and determine whether from them an intention to make a gift is manifested and if the facts logically and reasonably support such a conclusion. See the following cases:

Commissioner of Internal Revenue v. Jacobson, 336 U.S. 28, 51; *Bounds v. United States*, 262 F. 2d 876, 884 (C.A. 4); *Peters v. Smith*, 221 F. 2d 721 (C.A. 3).

The Trial Judge made a careful and comprehensive "findings of fact" and drew his inferences and con-

clusions therefrom. He had an opportunity to observe the witnesses and form a judgment of their sincerity, honesty and intentions not available to a reviewing court. We are of the opinion that the facts as found warrant the conclusions and inferences which he drew from them. Under Rule 52(a) F.R.C.P. we are not to disturb those "findings" unless clearly erroneous.

This rule is applicable to inferences drawn from documents or undisputed facts. *United States v. Gypsum Co.*, 333 U.S. 364, 394.

"Even where there is no dispute about the facts, if different reasonable inferences may be fairly drawn from the evidence, we are forbidden to disturb the findings based on such inferences unless they are clearly erroneous." *Central Ry. Signal Co. v. Longden*, 194 F. 2d 310, 318; *Rich v. Pappas*, 229 F. 2d 308, 313 (C.A. 6).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, cited above; *McAllister v. United States*, 348 U.S. 19, 20.

Upon a consideration of the entire record, we are not left with any "definite and firm conviction that a mistake has been committed."

The judgment of the District Court will be affirmed upon the findings and conclusions of the Trial Judge.

APPENDIX C

I. PAYMENTS TO CURRENT EMPLOYEES

Blair v. Rosseter, 33 F. 2d 286 (C.A. 9): At annual stockholders' meeting, stockholders adopted resolution making \$50,000 "gift" to president "in recognition of his able and successful direction" of the company for the past 10 years. Held, *gift*: intent clear from resolution, and so treated by corporation (charged to surplus and not deducted).

Levey v. Helvering, 68 F. 2d 401 (C.A.D.C.): Each year for 7 years the directors resolved "as a gift from the company and not as extra compensation" to pay the income taxes of the five top officers. Held, *compensation*. Words not controlling. To ascertain intent, look to motive, and motive obviously to assure full salaries undiminished by taxes. Also consideration of past and future services. And if not for services, improper.

Yuengling v. Commissioner, 69 F. 2d 971 (C.A. 3): Corporation paid premiums on life insurance policy in favor of wife and children of president and sole stockholder. Held, *compensation*. "A corporation cannot lawfully give away its assets."

Fitch v. Helvering, 70 F. 2d 583 (C.A. 8): Directors cancelled \$25,000 debt of its president and 90% stockholder, there being testimony they were moved by sympathy because of his domestic troubles and ill health. Held, *not gift* (though found to be dividend rather than compensation). Gift is transfer without consideration. Though some " earmarks " of gift, are

"some facts" the other way. May have been to distribute profits to president before his wife got 25% of the stock in a divorce settlement. Moreover, directors without authority to give away assets. Anyway, evidence doesn't "compel" conclusion of gift and Board justified in concluding that received as stockholder.

Commissioner v. Bonwit, 87 F. 2d 764 (C.A. 2): Corporation paid premiums on life insurance policy irrevocably naming president's wife and children as beneficiaries. Held, *compensation*: though Board found that not "intended" as compensation, presumption that officers did not make illegal gift of corporate assets; confirmed by deduction of premiums, showing didn't "regard" as gift.

Chandler v. Commissioner, 119 F. 2d 623 (C.A. 3): President occupied house owned by corporation. Rental value held *compensation* because a corporation has no capacity for affection.

Nickelsburg v. Commissioner, 154 F. 2d 70 (C.A. 2): President (and 74% stockholder) of corporation voted "wedding gift" of \$7,500 by directors "in recognition of" his past services; charged to surplus. Held, *compensation*: that called gift, charged to surplus, and not deducted is evidence of gift; but also said in "recognition" of services, and up to the Tax Court to resolve the conflict.

Peacock v. Commissioner, 256 F. 2d 160 (C.A. 5): The president of a corporation and his mother occupied a house, at nominal rental, which they had transferred to a corporation owned by them. Rental value held *gift*, reversing Tax Court: no evidence that ~~it~~ ^{to} be regarded as compensation. A gift from the corporation to its stockholders.

Van Sicklen v. Commissioner, 33 B.T.A. 544: Investment corporation made Christmas "gifts" to most

officers and employees, equal to half of salary, specifically saying that to be treated as nontaxable gift; charged directly to surplus. Held, *compensation*: words not controlling; made only to officers and employees; measured by salary; can be explained only as compensation.

Laurie v. Commissioner, 12 T.C. 86: At a time when wages were frozen, the husband-partner of a husband-wife partnership gave an employee and long-time personal friend \$1500 as a personal "gift" from himself, making similar gifts to three other employees. Held, *compensation*. That called and treated as gifts not controlling; "intention" turns on all the facts, which show that compensation; called gift only because of wage freeze.

II. PAYMENTS TO EMPLOYEES UPON SALE OF STOCK

Jones v. Commissioner, 31 F. 2d 755 (C.A. 3): Out of the proceeds of the sale of all the stock of a corporation, \$300,000 was set aside and distributed to the entire administrative staff. A proposal to have the corporation make the payments had been rejected on advice of counsel that improper. Held, *gift* because, no obligation of, or consideration to, the stockholders; paid out of their assets, not the corporation's.

Bass v. Hawley, 62 F. 2d 721 (C.A. 5): Railroad holding company sold stock of subsidiary under plan approved by its stockholders which authorized distribution of \$1 million of proceeds to employees of subsidiary. Held, *compensation*. Payments made "because of past labor" are compensation; not a gift unless made "only because of personal affection or regard or pity, or from general motives of philanthropy or charity."

Barnes v. Commissioner, 17 B.T.A. 1002: Same transaction as *Bass*. Held, *gift* because delivery, ac-

ceptance, and intent. Paid without obligation or consideration; desire only "fittingly to reward past services" from which had indirectly benefited. *Overruled in Schumacher v. Commissioner*, 27 B.T.A. 895, on authority of *Bass*.

III. PAYMENTS TO EMPLOYEES UPON TERMINATION OF EMPLOYMENT

Daly v. Commissioner, 3 B.T.A. 1042: Directors (president and another) voted president, who was too ill to perform duties, "gifts" of \$72,000, which it charged to surplus and did not deduct. Held, *gift*. Delivery, acceptance, and an "intention to give" shown by calling "gifts", charging to surplus, and not deducting. Disapproved in *Van Sicklin v. Commissioner*, 33 B.T.A. 544.

Beatty's Estate v. Commissioner, 7 B.T.A. 726: Director of Fine Arts Department of Carnegie Institute, retired for ill health after 30 years, was made Director Emeritus with an "honorarium" of \$500 per month. Held, *compensation*: for gift, must be intent, delivery, and acceptance but without consideration. Past services may be consideration and can't say they weren't here. Also directors without authority to give away assets.

Garey v. Commissioner, 16 B.T.A. 274: Employee resigned after 23 years, and directors resolved to continue his "salary" for balance of year, deducting the payment. Held, *compensation*. Depends on whether "intended" as a gift or compensation and the only evidence of intention, that called "salary" and deducted, negatives intention to make gift. Shouldn't impute "intent" to make gift because would be illegal application of funds.

Landon v. Commissioner, 16 B.T.A. 907: Officers who were replaced in a corporate reorganization were

given payments based on salary. Held, *compensation*. Gift requires delivery, acceptance and intention to make gift, and must be without consideration. No evidence of who authorized payments or how considered by corporation. That payments were based on salary indicates they were in consideration of past services, but in any event evidence inadequate to establish gift.

Binger v. Commissioner, 22 B.T.A. 111: Before merger of an insurance association with another company, directors voted president, who had served without compensation, a "gift" of \$5,000. Held, *compensation*. For gift, must be intent to make gift and without consideration, and can't say without consideration. And directors without authority to give away assets.

Lougee v. Commissioner, 26 B.T.A. 23: Upon employee's resignation after 40 years, his salary was continued for 9 months. Held, *compensation*. Question of intention. President referred to it as an "obligation" and as "salary"; treated on books as expense and deducted. Board's resolution of conflicting evidence supported.

Anderson v. Commissioner, 31 B.T.A. 197, affirmed *per curiam*, 79 F. 2d 979 (C.A. 2): Secretary of corporation, upon resignation, voted \$135,000 "in recognition of" services by directors. Held *compensation* because: said "in recognition of" services; directors thought it would be taxable; directors without authority to make gifts; and corporation treated as expense and deducted.

Knowles v. Commissioner, 5 T.C. 525: A teacher's retirement fund of a discontinued school being inadequate to provide for all the precipitated retirements, the institute operating the school contributed \$58,000 to permit reasonable lump settlements, having obtained a special act of the legislature to permit use

of its assets for "a payment of pensions, retirement allowances or other sums" to its former employees. Held, *gift*. "It is apparent that the institute intended to make a gift." Had already given severance pay and under no moral or legal obligation to do more. No less a gift because inspired by past services.

Beggy v. Commissioner, 23 T.C. 736, affirmed *per curiam*, 226 F. 2d 584 (C.A. 3): Vice President, retiring before his rights had vested under a new pension plan, voted \$26,000 (equivalent to rights he would have had) by directors. Held, *compensation*. Directors "didn't have in mind the making of a gift" but felt moral obligation.

Walker v. Commissioner, 25 T.C. 832: Upon resignation of vice president for ill health, directors resolved that "a gift" of \$11,000 be made "as a token of appreciation" for his loyal services. Held, *compensation*. Although called gift, evidence as whole shows intended to reward more completely; said "appreciation" for services; testimony that payment would not have been made but for services; deducted; not approved by stockholders.

Fisher v. Commissioner, 59 F. 2d 192 (C.A. 2): Employee, resigning after 24 years, was paid \$6,000 by officers in addition to salary. Held, *compensation*. Question is one of intention, and intention clearly indicated by treating as expense and deducting. That president of holding company approved doesn't mean gift; he had no authority to give away corporate assets.

Cunningham v. Commissioner, 67 F. 2d 205 (C.A. 3): When new owners took over corporation, president offered his resignation. Directors accepted and, with stockholder ratification, resolved, "in appreciation of" his "excellent guidance" of corporation in

past, payment of \$15,000 as "honorarium." Held *gift* because without obligation and "treated" as gift by directors in obtaining stockholder approval.

Botchford v. Commissioner, 81 F. 2d 914 (C.A. 9): Vice president, after 14 years' service, resigned for ill health. Executive committee recommended that directors consider "remuneration"; directors resolved to pay year's salary, reciting his service for "many years", and his inability to get other work. Held, *compensation*. Gift is transfer with intent to make gift and without consideration. Directors testified that intended gift, but resolution recites services; executive committee spoke of "remuneration"; corporation deducted; and stockholders didn't ratify. Board of Tax Appeals' resolution of conflicting evidence final.

Willkie v. Commissioner, 127 F. 2d 953 (C.A. 6): Executive resigned because of dissatisfaction with policies; directors resolved that he be given \$15,000 "in appreciation" of services. Held, *compensation*. Intent inferred from fact that measured by salary; language; deduction; and treatment on books as salary.

Carragan v. Commissioner, 197 F. 2d 246 (C.A. 2): Upon liquidation of corporation, executive voted \$19,000 in resolution reciting that past compensation inadequate. Held, *compensation*. Though no obligation or anticipated benefit, enough that services "motivated" payment; Tax Court was entitled to "disbelieve" testimony of director that "conceived" of payment as gift.

Peters v. Smith, 221 F. 2d 721 (C.A. 3): A department store employee retired for old age was given an annuity contract paying \$25 per week. In giving pensions, the corporation had no established plan, treating each case on an ad hoc basis, taking into account length of service, other resources, etc. No one retired

so long as physically able to work. Held, *gift*. Since pensions to aged employees widely recognized way of requiting past services, some "inference" that compensation from that alone, but jury could have found "donative intent" from facts that: ad hoc procedure; no one "entitled" to retire at pension, only if disabled; took into account employee's needs.

IV. MINISTER RETIREMENT PENSIONS

Schall v. Commissioner, 174 F. 2d 893 (C.A. 5): Pastor resigned after 18 years because of illness. The congregation "moved by affectionate regard for him and gratitude" for his "valued ministry" resolved that he be given \$2,000 per year. Held *gift*, reversing the Tax Court: manifestly bestowed only out of personal affection and regard.

Mutch v. Commissioner, 209 F. 2d 390 (C.A. 3): Minister retired after 24 years; Session Elders thought his resources inadequate for him to live "as we would like our old minister to live"; gave him "honorarium" of \$170 per month. Held, *gift*: motivated solely by the congregation's affection for the minister.

Hershman v. Kavanagh, 120 F. Supp. 956 (E.D. Mich.), affirmed, 210 F. 2d 654 (C.A. 6): Upon a rabbi's retirement after 39 years, the Board of Trustees recommended to the membership, and they adopted, a resolution that the \$5,000 pension previously provided for was inadequate and his "retirement compensation shall be" \$7,500. The increase held, *gift*: no obligation; "intended to make gifts"; inspired by feeling that pension inadequate and admiration, affection, and esteem.

Abernethy v. Commissioner, 211 F. 2d 651 (C.A. D.C.): Pastor, retiring after twenty years service, voted \$200 monthly pension by membership "as a

token of its gratitude and appreciation." Tax Court held compensation, since no more than "justly due." Court of appeals held *gift*, on authority of *Schall*, *Mutch*, and *Hershman*.

Rev. Rul. 55-422 (1955-1 Cum. Bull. 14): The Service announced that it would accept the rulings in the above cases on their particular facts.

V. PAYMENTS TO EMPLOYEE'S ESTATE

Bausch's Estate v. Commissioner, 186 F. 2d 313 (C.A. 2): On death of third of four key officers, corporation paid year's salary to estate, as had done to widow and estate of first two. Held, *compensation*. Tax Court could "infer" that was a reward for past services from: deduction, consistent practice, and measurement by salary.

Brayton v. Welch, 39 F. Supp. 537 (D. Mass.): Upon death of treasurer, directors voted to continue "salary" for one year to estate, and deducted. Held, *compensation*. Question whether "intended" as gift or compensation. Testimony of directors that intended as gift outweighed by: calling "salary" in resolution; lack of stockholder approval, since directors can't make gifts; claim of deduction, which shows didn't "regard" as gift; and payment to estate rather than family.

V. WIDOW BONUSES

I.T. 3329, 1939-2 Cum. Bull. 153: Amount of a deceased employee's salary paid to his widow or his heirs for a limited period is deductible as a business expense. The payments constitute gifts to the widow since when "an allowance is paid by an organization to which the recipient has rendered no services, the amount is deemed to be a gift or gratuity."

Aprill v. Commissioner, 13 T.C. 707: Widow of president, owning 75% of the stock, voted \$36,000 "in recognition of" husband's services by directors and stockholders. Held, *gift* notwithstanding "recognition" language and corporation's deduction because I.T. 3329 said it was.

Macfarlane v. Commissioner, 19 T.C. 9: Upon death of executive, president directed that salary for rest of the year and the same voluntary bonus that he had received in the preceding year be paid to his widow (\$67,000). Held, *gift*. Question of intent, and president was specifically advised that could make it as a gift and yet deduct it under I.T. 3229. Particularly significant that to widow, not estate.

I.T. 4027, 1950-2 Cum. Bull. 9: I.T. 3329 misconstrued the regulations, which apply only to "pensions awarded by one to whom no services have been rendered," which was intended to cover such transactions as payments made by the Carnegie Foundation to teachers. Irrelevant that recipient performed no services, if services were performed for the payor. I.T. 3329 will not be followed as to any payments made after 1950.

Hellstrom v. Commissioner, 24 T.C. 916: Upon death of founder and president (owning, with wife, 35% of stock), directors resolved, "in recognition of" his services and "in conformity with the policy of this corporation to make reasonable provision for" dependents of deceased officers and employees, to pay salary for balance of the year (\$29,000) to his widow, deducting the payment. Held, *gift*: "in recognition" language irrelevant, since obviously in all cases "the basic reason for the payment is because of the deceased employee's association with the corporation." Where a payment "is" a gift, as "whole record" here establishes, statement of reasons for it doesn't change

it—the necessary meaning of statement in *Bogardus* “that a gift is nonetheless a gift because inspired by gratitude for past faithful service.” *Aprill* and *MacFarlane* control; while decided before I.T. 4027, Commissioner “cannot by administrative ruling tax as ordinary income a payment which the payor made and intended as a gift.” Against other evidence, deduction and measurement by salary not particularly significant. The controlling facts here which establish a gift are (p. 920):

that the payment was made to petitioner and not to her husband's estate; that there was no obligation on the part of the corporation to pay any additional compensation to petitioner's husband; it derived no benefit from the payment; petitioner performed no services for the corporation and, as heretofore noted, those of her husband had been fully compensated for. We think the principal motive of the corporation in making the payment was its desire to do an act of kindness for petitioner. * * *

Maycann v. Commissioner, 29 T.C. 81: Upon death of president (who, with wife, owned 60% of the stock), directors resolved that “in recognition” of his services, widow be paid \$19,400, which was deducted. Held, *gift*. Intent governs, and four directors testified that intended as a gift; husband had been fully paid; no obligation; widow rendered no services.

Luntz v. Commissioner, 29 T.C. 647: Upon death of president of corporation owned by him and 3 brothers, directors resolved to pay widow \$96,000 “in consideration of” his past services, also resolving to make equivalent payments to the widows of the other brothers. The corporation deducted the payment. Held, *gift*. “Intent” to make gift inferred from facts that widow performed no service; no obligation; no benefit to corporation; and husband had been fully paid. The

simultaneous authorization of future widow benefits casts some doubt on "intent", but were separable.

Lengsfeld v. Commissioner, 241 F. 2d 508 (C.A. 5): A corporation owned by 7 brothers and sisters paid \$500 per month to the widows of three of the brothers or brothers-in-law, in each case as a "gratuity" in "recognition" of the deceased employee's services. The three widows together owned 63% of the stock. Held, *dividends*: whether gift a question of fact and on all evidence Tax Court concluded that dividends. There were earnings and profits, and payments were charged to surplus. Consented to by other stockholders. Fits the definition of a dividend.

United States v. Bankston, 254 F. 2d 641 (C.A. 6): Upon death of president (who, with wife, owned 88% of stock), directors resolved that \$30,000 be paid his widow "in recognition" of his services. Held, *gift*: question of fact, depending on intention of payor to be inferred from all circumstances, so must affirm district court's finding.

Simmons v. United States, 261 F. 2d 497 (C.A. 7): Widow of executive vice-president paid \$33,750 under standing resolution to pay 9 months' salary to widows of chief officers, deducting as salary. Held, *compensation*: even if not enforceable, an inducement to officers to remain. Clear that no "intent" to make gift, since can't be contended that can deduct a gift. Also a moral obligation.

Bounds v. United States, 262 F. 2d 876 (C.A. 4): Upon president's death, directors of family corporation (owned 50% by president's family and 50% by family of cousin raised by him) voted widow \$40,000 "in recognition" of and as "additional compensation for" his services, which the corporation deducted. Held, *gift*, reversing district court. Since widow performed no services, presume gift; president had been

fully paid and no moral obligation arising from established plan; "words" used by directors not controlling; had they "regarded" it as compensation, they would have paid it to his estate; irrelevant under *Bogardus* that "motivated" by services.

Rodner v. United States, 149 F. Supp. 233 (S.D. N.Y.): Widow of vice president of subsidiary paid \$13,000 at direction of officers of parent, who took into account only length and character of service, not widow's needs. Similar payments made to widows of every executive or professional employee who had died during past 7 years (9 in all). Held, *gift*: paid to widow, not estate; no legal or moral obligation; practice hadn't yet become an enforceable plan.

Jackson v. Granquist, 169 F. Supp. 442 (D. Ore.): Upon the death of the president of a corporation owned $\frac{1}{3}$ by him and $\frac{2}{3}$ by his mother, the directors resolved that "in recognition of" his services \$24,000 be paid to his widow. Held, *gift*. The corporation "intended to make gifts" since: payment to widow rather than estate; no obligation; no benefit to corporation; widow performed no services; and his services had been adequately compensated.

Internal Revenue Service Technical Information Release No. 87, August 25, 1958: In view of the number of adverse court decisions [of which the above are only a few], the Service "will no longer litigate" widow bonus cases arising under the Internal Revenue Code of 1939 except in exceptional circumstances. The policy does not apply to 1954 Code cases.

VI. ADVERTISING PRIZES

Washburn v. Commissioner, 5 T.C. 1333: "Pot O' Gold" radio show picked name from telephone book and gave \$900. Held, *gift*: none of the earmarks of

income, no capital, no labor; came totally without effort.

Campeau v. Commissioner, 24 T.C. 370: Radio show telephoned persons at random and gave prizes for correct answers to simple questions. Held, *gift* because performed no services.

Glenn v. Bates, 217 F. 2d 535 (C.A. 6): Automobile dealer advertised that car would be given away by drawing of names registered at showroom. Held, *gift* because winner did nothing and advertisement said car would be "given" away.

Fernandez v. Fals, 144 F. Supp. 630 (S.D. Fla.): Baseball club advertised that car to be given away by drawing of ticket stubs. Held, *gift* because winner did nothing (an avid fan who went to all the games anyway), the fact that the advertisement said the car would be "given" away also having an "important bearing" on the outcome.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 546.

ALDEN D. STANTON and LOUISE M. STANTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

CLENDON H. LEE,

Counsel for Petitioners,

120 Broadway,

New York 5, N. Y.

Of Counsel:

JOHN C. FARBER,

WILLIAM F. SNYDER,

THEODORE Q. CHILDS,

O'CONNOR & FARBER,

120 Broadway,

New York 5, N. Y.

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PETITIONERS' REPLY BRIEF.

Introduction.

The Government stakes its entire case upon a demand that this Court create a retroactive body of federal corporation law declaring that no corporation has ever had the capacity to make gifts.

This is a nation-wide "Restatement" of corporation law, impairing even colonial charters. Neither the record nor the Petition for Certiorari even refers to this question.

In keeping with this completely novel thesis, the headings in the lengthy and scholarly Government brief are primarily in the subjunctive mood, or what the law "should" or "may" be. The arguments therefore, while directed to this Court, should have been directed to Congress.

The case or controversy of Stanton, who sues to recover monies illegally assessed and collected from him, is not discussed until page 77 of the Government brief, and its discussion is concluded on page 79. The relative proportions of the brief directed to the legislative process and to the judicial process are thus apparent.

The Government's brief (p. 77) "expressly concedes" that the Rector, Vestry and Churchwardens of Trinity Church intended to make a gift. This necessarily includes the fact that there was no past or future consideration for the gift.

The Government's brief must be read as also conceding the establishment on trial of each and every evidentiary fact upon which the trial judge made his finding of ultimate fact that a gift was made (Pet. br., pp. 24, 25). The Government must also concede that the majority below, in substituting their weighing of the evidence for that of the trial judge, made the patent errors described on pages 27-28 of Petitioners' main brief.

There is not one word of argument on the evidence. But by interposing a retroactive federal corporate incapacity, Respondent's brief purports to alter the intent to make a gift, and the fact of making the gift, and asserts that there was a mere hope that the donee would take it tax free. There is nothing in the record as to either the donor's or donee's hopes or legal conclusions as to tax consequences, except that after the gift was made both parties treated the same in all respects as a gift.

Events control tax consequences. By conceding all, and not discussing any, of the evidentiary facts, the Government attempts to lead this Court to believe that mere nomenclature is involved.

By attempting to provoke an argument on nomenclature, the Government hopes to substitute "motive" for events.

Taxation, then, a most specific exercise of sovereign power, is to be dependent upon "motive". The law is to be reduced, according to the Government, to motivational research. This will "resolve most of the cases automatically" (Govt. brief, p. 8).

The objective of the Government, then, is automatic jurisprudence turning upon motive, operating under statutes stripped of objective standards and non-cognizant of events.

The Government asks this Court automatically to disqualify departed faithful stewards and old retainers from their statutory right to receive gifts free of income tax—all upon the spurious jurisprudence of motive.

I.

The Government's disregard of this record.

At the beginning of the trial (R. 18) and again immediately before the end of the trial (R. 60), it was stipulated that the only question was the nature of the payment to Stanton.

There was no issue under the pleadings, or even referred to upon trial, with respect to the power under their charter from Queen Anne of the "Rector, Vestry and Churchwardens of Trinity Church" to make a gift. Under the stipulation there could have been no such issue.

The Government here asserts, contrary to the stipulation and without any fact in the record relating to the powers of the "Rector, Vestry and Churchwardens of Trinity Church", that they have no power under their charter to make a gift, and therefore, that no gift was made to Stanton.

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In the face of the stipulation, and with absolutely nothing in the record concerning such charter, the Government claims standing to seek reversal of the Dartmouth College Case, even though the corporation concerned is not a party.

The Government claims that a gift can be made only when there is an intensely personal and individually felt emotion. The purpose of stating such an hypothesis is to demonstrate that a corporation, not being flesh and blood, cannot have such requisite, uniquely personal and individually felt, emotions prerequisite to a gift. By the same token, a corporation presumably could not give birth to a subsidiary, since it lacks biological instincts.

It would follow from the Government's theory that corporations have never had the capacity to make charitable gifts, that corporations organized for charitable purposes are the merest subterfuge, because they cannot feel the emotions requisite to charitable activities, and must *ipso facto* be disqualified under the statutory standards of a charity. Tax exemption would require the dissolution of every charitable corporation in the country and the turning over of all charitable activities to individuals, who could individually experience in their own minds the proper emotional, charitable feelings to meet the statutory standards.

Indeed, the Government's argument is so broad that it would strip away from the "Rector, Vestry and Churchwardens of Trinity Church", who are the corporation of Trinity Church, all capacity to make gifts and to engage in charitable activity.

The Government's argument also is that the "President and Fellows of Harvard College" who are the corporation, cannot make gifts and cannot engage in charitable activity.

Congress, at will, can specify tax consequences of events. But here, the Government demands retroactive judicial limitations on corporate powers as the absolutely necessary

and essential step in imposing tax liability upon a third party, dehors the corporation.

Surely a *retroactive* holding by this Court that corporations have never had the power to make gifts would create the most incredible chaos in a federal system. It would erect a federal law of corporations which would purport to amend the contracts or charters of the most ancient corporations in the country, as well as modern business corporations.

The Government argument cannot possibly be construed as a tax argument relating to Mr. Stanton. Almost the entire brief is directed toward a federal disability upon corporations.

It is necessary, in the Government's view, to amend the charters and contracts of corporations, even a royal charter in the case of the "Rector, Vestry and Churchwardens of Trinity Church," as a *prerequisite* to reaching the tax questions relating to Mr. Stanton. Thus, unconstitutional impairment of contract and improvident creation of federal corporation law is the foundation of the Government's entire case.

Crimes, *malum in se*, are committed by corporations, and their liability is established by imputing to the corporations the knowledge, intent, willfulness and other acts of individuals acting for the corporations. This is so, even though guilt is "personal". To dehumanize corporations sufficiently to deprive them of the capacity to make gifts would necessarily dehumanize them sufficiently to eliminate any capacity to commit crimes. A corporation which can commit fraud, including tax fraud, is a sufficiently sentient being to make a gift.

The Government's argument is directed to the inherent power and inherent nature of corporations. The Government's argument is not directed to anything which it claims Congress has done to describe the tax consequences of economic events.

The Government is asking this Court to do what Congress has never done, namely to fragment corporations for tax purposes, and then to create a new scheme of taxation which integrates individual and corporate taxation. It is clear that what the Government is here attempting is the most sweeping type of amendment to the Internal Revenue Code—a purely legislative function.

II.

The Government admits Trinity Church gave Stanton something for nothing.

The Government does not claim that any of the facts or circumstances surrounding the payment to Stanton constituted consideration. Since the Government “expressly concedes” (Gov. brief, p. 77) that the Vestrymen intended to make a gift, such intent, together with the delivery of the gift without consideration, constitutes a gift.

The same situation obtained in *Bogardus v. Commissioner*, 304 U. S. 34, where consideration was negated because the donees had been fully compensated and there was no “anticipated benefit” to the donor. Therefore in both the case at bar and in *Bogardus*, the donees were given something for nothing.

The *Bogardus* decision was certainly approved by this Court in 1956 in *Commissioner v. LoBue*, 351 U. S. 243, when this Court found that an incentive pay plan in the form of a stock option was compensation. The consideration for the stock option was continued employment. The employer did not give away something for nothing, as in this case and as in *Bogardus*. The employer bound executives closer to the employer in the future by offering to

them stock at less than the market value. There was anticipated benefit in the form of higher profits to the corporation, and it was, as this Court stated, "prompted by the employer's desire to get better work from him".

The Government relies upon this stock option case. But, the right to acquire stock which was contingent upon continuing employment had "none of the earmarks of a gift".

Continuing employment in the future in that case differs entirely from the terminated employment in *Bogardus* and the terminated employment in the case at bar. Here there is no "anticipated benefit", and the fact that Stanton was fully compensated for past services is not only clear in the record but dramatically illustrated by the fact that his successor received only half as much for a salary.

Thus, in the case at bar, there was no past consideration and there was no future consideration in connection with the gift.

But the Government looks upon the *LoBue* case as justifying a complete overturning of the question of intent to make a gift, which is evidenced by the absence of consideration and seeks to inject a wholly subjective determinant of "motive" which would displace the traditional concepts of consideration and intent. The Government's treatment of *LoBue* is a distortion of the case, as is evidenced by Mr. Justice Black's statement for the entire Court:

"But there was not the slightest indication of the kind of detached and disinterested generosity which might evidence a 'gift' in the statutory sense. These transfers of stock bore none of the earmarks of a gift. They were made by a company engaged in operating a business for profit, and the Tax Court found that the stock option plan was designed to achieve more profitable operations by providing the employees 'with an incentive to promote the growth

of the company by permitting them to participate in its success'. 22 TC at p. 445.

Under these circumstances, the Tax Court and the Court of Appeals properly refrained from treating this transfer as a gift. The company was not giving something away for nothing" (pp. 246-7).

LoBue is therefore a complete refutation of the Government's argument that concepts of property and contract law have been "uncritically taken" into the tax law. Congress did not redefine the legal term of a gift for income tax purposes, and therefore the commonly understood elements of a gift were taken into the statute. This Court did not examine into "motive". This Court properly looked to see whether there was *consideration*. Therefore, this Court employed the traditional concepts of property law and contract law in *LoBue* and, finding that the option was an incentive or an inducement, found consideration. Therefore, "the company was not giving away something for nothing".

If the concept of consideration is kept in mind, the Court will appreciate that the discussion contrasting "motive" with "intent" is wholly spurious. So extreme is the Government's effort to draw attention of the Court away from the concept of *consideration*, as having a bearing upon the "intent" to make a gift, that when mention of the problem is almost inescapable. (Govt. brief, p. 66) the Government uses a circumlocution—"bargained-for-exchange". The Court will readily perceive that "bargained-for-exchange" is too narrow a term to embrace "anticipated benefits" and other types of consideration which bear upon intent.

Conclusion.

The trial court found that a gift was made. The evidence, including oral testimony, was that something of value was transferred absolutely and without consideration to Stanton under circumstances which are consistent only, with the intent of the grantor to make a gift. All of this is conceded by Respondent.

The realistic test of a gift is whether an absolute transfer is without consideration. Respondent confuses this realistic and conventional test, which has been approved as recently as 1956 by this Court in *LoBue, supra*, with an indefinable test of "motive".

Respondent, in effect, confesses error in this Court, unless the Court can be induced to order the pursuit of some species of "motive" in each case. Since motives could never be the proper subject of judicial determination, even for the most astute trial court or the sagest jury, the Government believes that this "automatically" accomplishes the incapacity of corporations to make gifts and the disqualification of departed faithful stewards and old retainers to receive gifts.

Law is concerned with events, not motives. What Respondent seeks, then, is not government under law, but government according to "why", as Respondent terms it.

The statute is specific and without qualification. The accomplishment of Respondent's objective, therefore, can only be achieved by adding words to the statute which would tax all payments by a corporation, whether gifts or otherwise.

What the Government seeks, then, is an absolute rule which would prevent a trial court from finding a gift in certain categories of cases. The establishment of categories is

the function of Congress to whom Respondent's request should be addressed.

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

CLENDON H. LEE,
Counsel for Petitioners,
120 Broadway,
New York 5, New York.

Of Counsel:

JOHN C. FARBER,
WILLIAM F. SNYDER,
THEODORE Q. CHILDS,
O'CONNOR & FARBER,
120 Broadway,
New York 5, N. Y.

SUPREME COURT OF THE UNITED STATES

NOS. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner,
376 v. Mose Duberstein, et al. } On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit.

Alden D. Stanton, et al.,
546 v. Petitioners, } On Writ of Certiorari to the
United States Court of Appeals for the Second United States of America. } Circuit.

[June 13, 1960.]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These two cases concern the provision of the Internal Revenue Code which excludes from the gross income of an income taxpayer "the value of property acquired by gift."¹ They pose the frequently recurrent question whether a specific transfer to a taxpayer in fact amounted to a "gift" to him within the meaning of the statute. The importance to decision of the facts of the cases requires that we state them in some detail.

No. 376, *Commissioner v. Duberstein*. The taxpayer, Duberstein,² was president of the Duberstein Iron & Metal Company, a corporation with headquarters in Dayton, Ohio. For some years the taxpayer's company had done business with Mohawk Metal Corporation, whose headquarters were in New York City. The president of Mohawk was one Beriman. The taxpayer and

¹ The operative provision in the cases at bar is § 22 (b) (3) of the 1939 Internal Revenue Code. The corresponding provision of the present Code is § 102 (a).

² In both cases the husband will be referred to as the taxpayer although his wife joined with him in joint tax returns.

Berman had generally used the telephone to transact their companies' business with each other, which consisted of buying and selling metals. The taxpayer testified, without elaboration, that he knew Berman "personally" and had known him for about seven years. From time to time in their telephone conversations, Berman would ask Duberstein whether the latter knew of potential customers for some of Mohawk's products in which Duberstein's company itself was not interested. Duberstein provided the names of potential customers for these items.

One day in 1951 Berman telephoned Duberstein and said that the information Duberstein had given him had proved so helpful that he wanted to give the latter a present. Duberstein stated that Berman owed him nothing. Berman said that he had a Cadillac as a gift for Duberstein, and that the latter should send to New York for it; Berman insisted that Duberstein accept the car, and the latter finally did so, protesting however that he had not intended to be compensated for the information. At the time Duberstein already had a Cadillac and an Oldsmobile, and felt that he did not need another car. Duberstein testified that he did not think Berman would have sent him the Cadillac if he had not furnished him with information about the customers. It appeared that Mohawk later deducted the value of the Cadillac as a business expense on its corporate income tax return.

Duberstein did not include the value of the Cadillac in gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the car's value against him, and in proceedings to review the deficiency the Tax Court affirmed the Commissioner's determination. It said that "The record is significantly barren of evidence revealing any intention on the part of the payor to make a gift. . . . The only justifiable inference is that the automobile was intended by the payor to be remuneration

for services rendered to it by Duberstein." The Court of Appeals for the Sixth Circuit reversed. 265 F. 2d 28.

No. 546, *Stanton v. United States*. The taxpayer Stanton had been for approximately 10 years in the employ of Trinity Church in New York City. He was comptroller of the Church corporation, and president of a corporation the church set up as a fully owned subsidiary, Trinity Operating Company, to manage its real estate holdings, which were more extensive than simply the church property. His salary by the end of his employment there in 1942 amounted to \$22,500 a year. Effective November 30, 1942, he resigned from both positions to go into business for himself. The Operating Company's directors, who seem to have included the rector and vestrymen of the church, passed the following resolution upon his resignation: "Be it resolved that in appreciation of the services rendered by Mr. Stanton . . . a gratuity is hereby awarded to him of Twenty Thousand Dollars, payable to him in equal instalments of Two Thousand Dollars at the end of each and every month commencing with the month of December, 1942; provided that, with the discontinuance of his services, the Corporation of Trinity Church is released from all rights and claims to pension and retirement benefits not already accrued up to November 30, 1942."

The Operating Company's action was later explained by one of its directors as based on the fact that, "Mr. Stanton was liked by all of the Vestry personally. He had a pleasing personality. He had come in when Trinity's affairs were in a difficult situation. He did a splendid piece of work, we felt. Besides that . . . he was liked by all of the members of the Vestry personally." And by another: "[W]e were all unanimous in wishing to make Mr. Stanton a gift. Mr. Stanton had loyally and faithfully served Trinity in a very difficult time. We thought of him in the highest regard. We understood

that he was going in business for himself. We felt that he was entitled to that evidence of good will."

On the other hand, there was a suggestion of some ill-feeling between Stanton and the directors, arising out of the recent termination of the services of one Watkins, the Operating Company's treasurer, whose departure was evidently attended by some acrimony. At a special board meeting on October 28, 1942, Stanton had intervened on Watkins' side and asked reconsideration of the matter. The minutes reflect that "resentment was expressed as to the 'presumptuous' suggestion that the action of the Board, taken after long deliberation, should be changed." The Board adhered to its determination that Watkins be separated from employment, giving him an opportunity to resign rather than be discharged. At another special meeting two days later it was revealed that Watkins had not resigned; the previous resolution terminating his services was then viewed as effective; and the Board voted the payment of six months' salary to Watkins in a resolution similar to that quoted in regard to Stanton, but which did not use the term "gratuity." At the meeting, Stanton announced that in order to avoid any such embarrassment or question at any time as to his willingness to resign if the Board desired, he was tendering his resignation. It was tabled, though not without dissent. The next week, on November 5, at another special meeting, Stanton again tendered his resignation which this time was accepted.

The "gratuity" was duly paid. So was a smaller one to Stanton's (and the Operating Company's) secretary, under a similar resolution, upon her resignation at the same time. The two corporations shared the expense of the payments. There was undisputed testimony that there were in fact no enforceable rights or claims to pension and retirement benefits which had not accrued at the time of the taxpayer's resignation, and that the last

proviso of the resolution was inserted simply out of an abundance of caution. The taxpayer received in cash a refund of his contributions to the retirement plans, and there is no suggestion that he was entitled to more. He was required to perform no further services for Trinity after his resignation.

The Commissioner asserted a deficiency against the taxpayer after the latter had failed to include the payments in question in gross income. After payment of the deficiency and administrative rejection of a refund claim, the taxpayer sued the United States for a refund in the District Court for the Eastern District of New York. The trial judge, sitting without a jury, made the simple finding that the payments were a "gift,"⁴ and judgment was entered for the taxpayer. The Court of Appeals for the Second Circuit reversed. 268 F. 2d 727.

The Government, urging that clarification of the problem typified by these two cases was necessary, and that the approaches taken by the Courts of Appeals for the Second and the Sixth Circuits were in conflict, petitioned for certiorari in No. 376, and acquiesced in the taxpayer's petition in No. 546. On this basis, and because of the importance of the question in the administration of the income tax laws, we granted certiorari in both cases. 361 U. S. 923.

The exclusion of property acquired by gift from gross income under the federal income tax laws was made in the first income tax statute³ passed under the authority of the Sixteenth Amendment, and has been a feature of the income tax statutes ever since. The meaning of the term "gift" as applied to particular transfers has always been a matter of contention.⁵ Specific and illuminating

³ See note 14, *infra*.

⁴ § 11.B., c. 16, 38 Stat. 167.

⁵ The first case of the Board of Tax Appeals officially reported in fact deals with the problem. *Parrott v. Commissioner*, 1 B. T. A. 1.

legislative history on the point does not appear to exist. Analogies and inferences drawn from other revenue provisions, such as the estate and gift taxes, are dubious. See *Lockard v. Commissioner*, 166 F. 2d 409. The meaning of the statutory term has been shaped largely by the decisional law. With this, we turn to the contentions made by the Government in these cases.

First. The Government suggests that we promulgate a new "test" in this area to serve as a standard to be applied by the lower courts and by the Tax Court in dealing with the numerous cases that arise.* We reject this invitation. We are of opinion that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases. The cases at bar are fair examples of the settings in which the problem usually arises. They present situations in which payments have been made in a context with business overtones—an employer making a payment to a retiring employee; a businessman giving something of value to another businessman who has been of advantage to him in his business. In this context, we review the law as established by the prior cases here.

The course of decision here makes it plain that the statute does not use the term "gift" in the common-law sense, but in a more colloquial sense. This Court has indicated that a voluntary executed transfer of his property by one to another, without any consideration or compensation therefor, though a common-law gift, is not necessarily a "gift" within the meaning of the statute. For the Court has shown that the mere absence of a

*The Government's proposed test is stated: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."

legal or moral obligation to make such a payment does not establish that it is a gift. *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 730. And, importantly, if the payment proceeds primarily from "the constraining force of any moral or legal duty," or from "the incentive of anticipated benefit" of an economic nature, *Bogardus v. Commissioner*, 302 U. S. 34, 41, it is not a gift. And, conversely, "[w]here the payment is in return for services rendered, it is irrelevant that the donor derives no economic benefit from it." *Robertson v. United States*, 343 U. S. 711, 714.⁷ A gift in the statutory sense, on the other hand, proceeds from a "detached and disinterested generosity," *Commissioner v. LoBue*, 351 U. S. 243, 246; "out of affection, respect, admiration, charity or like impulses." *Robertson v. United States*, *supra*, at 714. And in this regard, the most critical consideration, as the Court was agreed in the leading case here, is the transferor's "intention." *Bogardus v. Commissioner*, 302 U. S. 34, 43. "What controls is the intention with which payment, however voluntary, has been made." *Id.*, at 45 (dissenting opinion).⁸

The Government says that this "intention" of the transferor cannot mean what the cases on the common-

⁷ The cases including "tips" in gross income are classic examples of this. See, e. g., *Roberts v. Commissioner*, 176 F. 2d 221.

⁸ The parts of the *Bogardus* opinion which we touch on here are the ones we take to be basic to its holding, and the ones that we read as stating those governing principles which it establishes. As to them we see little distinction between the views of the Court and those taken in dissent in *Bogardus*. The fear expressed by the dissent at 302 U. S., at 44, that the prevailing opinion "seems" to hold "that every payment which in any aspect is a gift is . . . relieved of any tax" strikes us now as going beyond what the opinion of the Court held in fact. In any event, the Court's opinion in *Bogardus* does not seem to have been so interpreted afterwards. The principal difference, as we see it, between the Court's opinion and the dissent lies in the weight to be given the findings of the trier of fact.

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law concept of gift call "donative intent." With that we are in agreement, for our decisions fully support this. Moreover, the *Bogardus* case itself makes it plain that the donor's characterization of his action is not determinative—that there must be an objective inquiry as to whether what is called a gift amounts to it in reality: 302 U. S., at 40. It scarcely needs adding that the parties' expectations or hopes as to the tax treatment of their conduct in themselves have nothing to do with the matter.

It is suggested that the *Bogardus* criterion would be more apt if rephrased in terms of "motive" rather than "intention."—We must confess to some skepticism as to whether such a verbal mutation would be of any practical consequence. We take it that the proper criterion, established by decision here, is one that inquires what the basic reason for his conduct was in fact—the dominant reason that explains his action in making the transfer. Further than that we do not think it profitable to go.

Second. The Government's proposed "test," while apparently simple and precise in its formulation, depends frankly on a set of "principles" or "presumptions" derived from the decided cases, and concededly subject to various exceptions; and it involves various corollaries, which add to its detail. Were we to promulgate this test as a matter of law, and accept with it its various presuppositions and stated consequences, we would be passing far beyond the requirements of the cases before us, and would be painting on a large canvas with indeed a broad brush. The Government derives its test from such propositions as the following: That payments by an employer to an employee, even though voluntary, ought, by and large, to be taxable; That the concept of a gift is inconsistent with a payment's being a deductible business expense; That a gift involves "personal" elements; That a business corporation cannot properly make a gift of its assets. The

Government admits that there are exceptions and qualifications to these propositions. We think, to the extent they are correct, that these propositions are not principles of law, but rather maxims of experience that the tribunals which have tried the facts of cases in this area have enunciated in explaining their factual determinations. Some of them simply represent truisms: it doubtless is, statistically speaking, the exceptional payment by an employer to an employee that amounts to a gift. Others are overstatements of possible evidentiary inferences relevant to a factual determination on the totality of circumstances in the case: it is doubtless relevant to the over-all inference that the transferor treats a payment as a business deduction, or that the transferor is a corporate entity. But these inferences cannot be stated in absolute terms. Neither factor is a shibboleth. The taxing statute does not make nondeductibility by the transferor a condition on the "gift" exclusion; nor does it draw any distinction, in terms, between transfers by corporations and individuals, as to the availability of the "gift" exclusion to the transferee. The conclusion whether a transfer amounts to a "gift" is one that must be reached on consideration of all the factors.

Specifically, the trier of fact must be careful not to allow trial of the issue whether the receipt of a specific payment is a gift to turn into a trial of the tax liability, or of the propriety, as a matter of fiduciary or corporate law, attaching to the conduct of someone else. The major corollary to the Government's suggested "test" is that, as an ordinary matter, a payment by a corporation cannot be a gift, and, more specifically, there can be no such thing as a "gift" made by a corporation which would allow it to take a deduction for an ordinary and necessary business expense. As we have said, we find no basis for such a conclusion in the statute; and if it were applied as a determinative rule of "law," would force the tribunals

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trying tax cases involving the donee's liability into elaborate inquiries into the local law of corporations or into the peripheral deductibility of payments as business expenses. The former issue might make the tax tribunals the most frequent investigators of an important and difficult issue of the laws of the several States, and the latter inquiry would summon one difficult and delicate problem of federal tax law as an aid to the solution of another.⁹ Or perhaps there would be required a trial of the vexed issue whether there was a "constructive" distribution of corporate property, for income tax purposes, to the corporate agents who had sponsored the transfer.¹⁰ These considerations, also, reinforce us in our conclusion that while the principles urged by the Government may, in nonabsolute form as crystallizations of experience, prove persuasive to the trier of facts in a particular case, neither they, nor any more detailed statement than has been made, can be laid down as a matter of law.

Third. Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case. The nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the

⁹ Justice Cardozo once described in memorable language the inquiry into whether an expense was an "ordinary and necessary" one of a business: "One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle." *Welch v. Helvering*, 290 U. S. 111, 115. The same comment well fits the issue in the cases at bar.

¹⁰ Cf., e. g., *Nelson v. Commissioner*, 203 F. 2d 1.

necessity of ascribing the proper force to each, confirm us in our conclusion that primary weight in this area must be given to the conclusions of the trier of fact. *Baker v. Texas & Pacific R. Co.*, 359 U. S. 227; *Commissioner v. Heininger*, 320 U. S. 467, 475; *United States v. Yellow Cab Co.*, 338 U. S. 338, 341; *Bogardus v. Commissioner*, *supra*, at 45 (dissenting opinion).¹¹

This conclusion may not satisfy an academic desire for tidiness, symmetry and precision in this area, any more than a system based on the determinations of various fact-finders ordinarily does. But we see it as implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried. If there is fear of undue uncertainty or overmuch litigation, Congress may make more precise its treatment of the matter by singling out certain

¹¹ In *Bogardus*, the Court was divided 5 to 4 as to the scope of review to be extended the fact-finder's determination as to a specific receipt, in a context like that of the instant cases. The majority held that such a determination was "a conclusion of law or at least a determination of a mixed question of law and fact." 302 U. S., at 39. This formulation it took as justifying it in assuming a fairly broad standard of review. The dissent took a contrary view. The approach of this part of the Court's ruling in *Bogardus*, which we think was the only part on which there was real division among the Court, see note 8, *supra*, has not been afforded subsequent respect here. In *Heininger*, a question presenting at the most elements no more factual and untechnical than those here—that of the "ordinary and necessary" nature of a business expense—was treated as one of fact. Cf. note 9, *supra*. And in *Dobson v. Commissioner*, 320 U. S. 489, 498, n. 22, *Bogardus* was adversely criticized, insofar as it treated the matter as reviewable as one of law. While *Dobson* is, of course, no longer the law insofar as it ordains a greater weight to be attached to the findings of the Tax Court than to those of any other fact-finder in a tax litigation, see note 13, *infra*, we think its criticism of this point in the *Bogardus* opinion is sound in view of the dominant importance of factual inquiry to decision of these cases.

factors and making them determinative of the matter, as it has done in one field of the "gift" exclusion's former application, that of prizes and awards.¹² Doubtless diversity of result will tend to be lessened somewhat since federal income tax decisions, even those in tribunals of first instance turning on issues of fact, tend to be reported, and since there may be a natural tendency of professional triers of fact to follow one another's determinations, even as to factual matters. But the question here remains basically one of fact, for determination on a case-by-case basis.

One consequence of this is that appellate review of determinations in this field must be quite restricted. Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. *Baker v. Texas & Pacific R. Co.*, *supra*, at 228. Where the trial has been by a judge without a jury, the judge's findings must stand unless "clearly erroneous." Fed. Rules Civ. Proc., 52 (a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U. S. 364, 395. The rule itself applies also to factual inferences from undisputed basic facts, *id.*, at 394, as will on many occasions be presented in this area. Cf. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339

¹² I. R. C., § 74, which is a provision new with the 1954 Code. Previously, there had been holdings that such receipts as the "Pot O'Gold" radio giveaway, *Washburn v. Commissioner*, 5 T. C. 1333, and the Ross Essay Prize, *McDermott v. Commissioner*, 80 U. S. App. D. C. 176, 150 F. 2d 585, were "gifts." Congress intended to obviate such rulings. S. Rep. No. 1622, 83d Cong., 2d Sess., p. 178. We imply no approval of those holdings under the general standard of the "gift" exclusion. Cf. *Robertson v. United States*, *supra*.

U. S. 605, 609-610. And Congress has in the most explicit terms attached the identical weight to the findings of the Tax Court. I. R. C., § 7482 (a).¹³

Fourth. A majority of the Court is in accord with the principles just outlined. And, applying them to the *Duberstein* case, we are in agreement, on the evidence we have set forth, that it cannot be said that the conclusion of the Tax Court was "clearly erroneous." It seems to us plain that as trier of the facts it was warranted in concluding that despite the characterization of the transfer of the Cadillac by the parties and the absence of any obligation, even of a moral nature, to make it, it was at bottom a recompense for Duberstein's past services, or an inducement for him to be of further service in the future. We cannot say with the Court of Appeals that such a conclusion was "mere suspicion" on the Tax Court's part. To us it appears based in the sort of informed experience with human affairs that fact-finding tribunals should bring to this task.

As to *Stanton*, we are in disagreement. To four of us, it is critical here that the District Court as trier of fact made only the simple and unelaborated finding that the transfer in question was a "gift."¹⁴ To be sure, concise-

¹³ "The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." The last words first came into the statute through an amendment to § 1141 (a) of the 1939 Code in 1948 (§ 36 of the Judicial Code Act, 62 Stat. 991). The purpose of the 1948 legislation was to remove from the law the favored position (in comparison with District Court and Court of Claims rulings in tax matters) enjoyed by the Tax Court under this Court's ruling in *Dobson v. Commissioner*, 320 U. S. 489. Cf. note 11, *supra*. See *Grace Bros., Inc., v. Commissioner*, 173 F.2d 170, 173.

¹⁴ The "Findings of Fact and Conclusions of Law" were made orally, and were simply: "The Resolution of the Board of Directors

ness is to be strived for, and prolixity avoided, in findings; but, to the four of us, there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be. See *Mattco Oil Transfer Corp. v. The Dynamic*, 123 F. 2d 999, 1000-1001. Such conclusory, general findings do not constitute compliance with Rule 52's direction to "find the facts specially and state separately . . . conclusions of law thereon." While the standard of law in this area is not a complex one, we four think the unelaborated finding of ultimate fact here cannot stand as a fulfillment of these requirements. It affords the reviewing court not the semblance of an indication of the legal standard with which the trier of fact has approached his task. For all that appears, the District Court may have viewed the form of the resolution or the simple absence of legal consideration as conclusive. While the judgment of the Court of Appeals cannot stand, the four of us think there must be further proceedings in the District Court looking toward new and adequate findings of fact. In this, we are joined by MR. JUSTICE WHITTAKER, who agrees that the findings were inadequate, although he does not concur generally in this opinion.

Accordingly, in No. 376, the judgment of this Court is that the judgment of the Court of Appeals is reversed.

of the Trinity Operating Company, Incorporated, held November 18, 1942, after the resignations had been accepted of the plaintiff from his positions as controller of the corporation of the Trinity Church, and the president of the Trinity Operating Company, Incorporated, whereby a gratuity was voted to the plaintiff, Allen [sic] D. Stanton, in the amount of \$2,000 payable to him in monthly installments of \$2,000 each, commencing with the month of December, 1942, constituted a gift to the taxpayer, and therefore need not have been reported by him as income for the taxable years 1942, or 1943."

and in No. 546, that the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result in No. 376. In No. 546, he would affirm the judgment of the Court of Appeals for the reasons stated by MR. JUSTICE FRANKFURTER.

MR. JUSTICE WHITTAKER, agreeing with *Bogardus* that whether a particular transfer is or is not a "gift" may involve "a mixed question of law and fact," 302 U. S., at 39, concurs only in the result of this opinion.

MR. JUSTICE DOUGLAS dissents, since he is of the view that in each of these two cases there was a gift under the test which the Court fashioned nearly a quarter of a century ago in *Bogardus v. Commissioner*, 302 U. S. 34.

SUPREME COURT OF THE UNITED STATES

Nos. 376 AND 546.—OCTOBER TERM, 1959.

Commissioner of Internal Revenue, Petitioner, 376 <i>v.</i> Mose Duberstein, et al.	} On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.
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Alden D. Stanton, et al., Petitioners, 546 <i>v.</i> United States of America.	} On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[June 13, 1960.]

MR. JUSTICE BLACK, concurring and dissenting.

I agree with the Court that it was not clearly erroneous for the Tax Court to find as it did in No. 376 that the automobile transfer to Duberstein was not a gift, and so I agree with the Court's opinion and judgment reversing the judgment of the Court of Appeals in that case.

I dissent in No. 546, *Stanton v. United States*. The District Court found that the \$20,000 transferred to Mr. Stanton by his former employer at the end of ten years' service was a gift and therefore exempt from taxation under I. R. C. of 1939, § 22(b)(3) (now I. R. C. of 1954, § 102 (a)). I think the finding was not clearly erroneous and that the Court of Appeals was therefore wrong in reversing the District Court's judgment. While conflicting inferences might have been drawn, there was evidence to show that Mr. Stanton's long services had been satisfactory, that he was well-liked personally and had given splendid service, that the employer was under no obligation at all to pay any added compensation, but made the \$20,000 payment because prompted by a genuine desire to make him a "gift," to award him a "gratuity." Cf.

Commissioner v. LoBue, 351 U. S. 243, 246-247. The District Court's finding was that the added payment "constituted a gift to the taxpayer, and therefore need not have been reported by him as income" The trial court might have used more words, or discussed the facts set out above in more detail, but I doubt if this would have made its crucial, adequately supported finding any clearer. For this reason I would reinstate the District Court's judgment for petitioner.

SUPREME COURT OF THE UNITED STATES

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Commissioner of Internal Revenue, Petitioner:	}	On Writ of Certiorari to the
376 v.		United States Court of
Mose Duberstein, et al.		Appeals for the Sixth Circuit.

Alden D. Stanton, et al.,	}	On Writ of Certiorari to the
Petitioners,		United States Court of
546 v.		Appeals for the Second
United States of America.		Circuit.

[June 13, 1960.]

MR. JUSTICE FRANKFURTER concurring in the judgment in No. 376 and dissenting in No. 546.

As the Court's opinion indicates, we brought these two cases here partly because of a claimed difference in the approaches between two Courts of Appeals but primarily on the Government's urging that, in the interest of the better administration of the income tax laws, clarification was desirable for determining when a transfer of property constitutes a "gift" and is not to be included in income for purposes of ascertaining the "gross income" under the Internal Revenue Code. As soon as this problem emerged after the imposition of the first income tax authorized by the Sixteenth Amendment, it became evident that its inherent difficulties and subtleties would not easily yield to the formulation of a general rule or test sufficiently definite to confine within narrow limits the area of judgment in applying it. While at its core the tax conception of a gift no doubt reflected the non-legal, non-technical notion of a benefaction unentangled with any aspect of worldly requital, the divers blends of personal and pecuniary relationships in our industrial society

inevitably presented niceties for adjudication which could not be put to rest by any kind of general formulation.

Despite acute arguments at the bar and a most thorough re-examination of the problem on a full canvass of our prior decisions and an attempted fresh analysis of the nature of the problem, the Court has rejected the invitation of the Government to fashion anything like a litmus paper test for determining what is excludable as a "gift" from gross income. Nor has the Court attempted a clarification of the particular aspects of the problem presented by these two cases, namely, payment by an employer to an employee upon the termination of the employment relation and non-obligatory payment for services rendered in the course of a business relationship. While I agree that experience has shown the futility of attempting to define, by language so circumscribing as to make it easily applicable, what constitutes a gift for every situation where the problem may arise, I do think that greater explicitness is possible in isolating and emphasizing factors which militate against a gift in particular situations.

Thus, regarding the two frequently recurring situations involved in these cases—things of value given to employees by their employers upon the termination of employment and payments entangled in a business relation and occasioned by the performance of some service—the strong implication is that the payment is of a business nature. The problem in these two cases is entirely different from the problem in a case where a payment is made from one member of a family to another, where the implications are directly otherwise. No single general formulation appropriately deals with both types of cases, although both involve the question whether the payment was a "gift." While we should normally suppose that a payment from father to son was a gift, unless the contrary

is shown, in the two situations now before us the business implications are so forceful that I would apply a presumptive rule placing the burden upon the beneficiary to prove the payment wholly unrelated to his services to the enterprise. The Court, however, has declined so to analyze the problem and has concluded "that the governing principles are necessarily general and have already been spelled out in the opinions of this Court, and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."

The Court has made only one authoritative addition to the previous course of our decisions. Recognizing *Bogardus v. Commissioner*, 302 U. S. 34, as "the leading case here" and finding essential accord between the Court's opinion and the dissent in that case, the Court has drawn from the dissent in *Bogardus* for infusion into what will now be a controlling qualification, recognition that it is "for the triers of the facts to seek among competing aims or motives the ones that dominated conduct." 302 U. S. 34, 45 (dissenting opinion). All this being so in view of the Court, it seems to me desirable not to try to improve what has "already been spelled out" in the opinions of this Court but to leave to the lower courts the application of old phrases rather than to float new ones and thereby inevitably produce a new volume of exegesis on the new phrases.

Especially do I believe this when fact-finding tribunals are directed by the Court to rely upon their "experience with the mainsprings of human conduct" and on their "informed experience with human affairs" in appraising the totality of the facts of each case. Varying conceptions regarding the "mainsprings of human conduct" are derived from a variety of experiences or assumptions about the nature of man, and "experience with human

affairs," is not only diverse but often drastically conflicting. What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences. This can hardly fail to invite, if indeed not encourage, too individualized diversities in the administration of the income tax law. I am afraid that by these new phrasings the practicalities of tax administration, which should be as uniform as is possible in so vast a country as ours, will be embarrassed. By applying what has already been spelled out in the opinions of this Court, I agree with the Court in reversing the judgment in *Commissioner of Internal Revenue v. Duberstein*.

But I would affirm the decision of the Court of Appeals for the Second Circuit in *Stanton v. United States*. I would do so on the basis of the opinion of Judge Hand and more particularly because the very terms of the resolution by which the \$20,000 was awarded to Stanton indicated that it was not a "gratuity" in the sense of sheer benevolence but in the nature of a generous lagniappe, something extra thrown in for services received though not legally nor morally required to be given. This careful resolution doubtless drawn by a lawyer and adopted by some hardheaded businessmen, contained a proviso that Stanton should abandon all rights to "pension and retirement benefits." The fact that Stanton had no such claims does not lessen the significance of the clause as something "to make assurance doubly sure." 268 F. 2d 728. The business nature of the payment is confirmed by the words of the resolution, explaining the "gratuity" as "in appreciation of the services rendered by Mr. Stanton as Manager of the Estate and Comptroller of the Corporation of Trinity Church throughout nearly ten years, and as President of Trinity Operating Company, Inc." The force of this document in light of all the factors to which Judge Hand adverted in his opinion, was not in the least diminished by testimony at the trial. Thus

the taxpayer has totally failed to sustain the burden I would place upon him to establish that the payment to him was wholly attributable to generosity unrelated to his performance of his secular business functions as an officer of the corporation of the Trinity Church of New York and the Trinity Operating Co. Since the record totally fails to establish taxpayer's claim, I see no need of specific findings by the trial judge.